Competition law and policy in a transitional China: transplantation and localisation

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COMPETITION LAW AND POLICY IN A TRANSITIONAL CHINA

TRANSPLANTATION AND LOCALISATION

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I, SU Hua, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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Abstract

Chinese competition law was conceived in the 1980s, soon after the post-Mao state adopted an open-door policy. Based primarily on the EC competition law model, an Anti-Monopoly Law (AML), as a principal pillar of Chinese competition law, has been formally on the legislative agenda since 1994 and was eventually enacted on 30 August 2007. Such delay was caused by a confluence of implicit and explicit social and legal-political factors.

This thesis seeks to explore the interaction between competition law and its ecological environment in a context of the People's Republic of China (the PRC) in transition. It evaluates substantial and procedural rules of the AML and identifies the dynamic interface between Chinese competition law and industrial policy and sectoral regulations. The thesis seeks to demonstrate that since having a viable and sound institutional arrangement is crucial to any competition law and there are tensions between the transitional economy and political structure of the PRC, an optimal implementation of competition law and policy is difficult to achieve under the current climate. Nevertheless, the thesis demystifies an obscure relationship between the AML procedure on the one hand, and Chinese litigation rules and legal-political reality on the other. It thus questions an "all-or-nothing" perspective and explores how competition law and policy affects the marketplace and governance of the PRC. By so doing, the thesis aims to facilitate the understanding of a three-dimensioned Chinese competition law and policy, within which formal rules, informal constraints, and enforcement characteristics are perceptible through a prism of cultural-historical, comparative, and institutional analyses. The thesis includes nine chapters. The law is as stated at 30 August 2007.

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SU Hua

List of Abbreviations

ABA	American Bar Association
AMC	Anti-Monopoly Commission (PRC)
ACFIC	All-China Federation of Industry and Commerce
AIC	Administration for Industry and Commerce (local bureaux of the SAIC)
AMEA	Anti-Monopoly Enforcement Authority (PRC)
AML	Anti-Monopoly Law (PRC)
A-Shares	RMB (Renminbi) ordinary shares
AUCL	Anti-Unfair Competition Law (PRC)
CAAC	General Administration of Civil Aviation (PRC)
CBRC	China Banking Regulatory Commission
CCP	Chinese Communist Party
CFI	Court of First Instance (EU)
CFIUS	Committee of Foreign Investment in the United States
CIRC	China Insurance Regulatory Commission
CJV	cooperative joint ventures
CSRC	China Securities Regulatory Commission
DoJ	Department of Justice (USA)
EC	European Community
ECJ	European Court of Justice
EJV	equity joint ventures
EU	European Union
FDI	foreign direct investment
FIE(s)	foreign-invested enterprise(s)
FTC	Federal Trade Commission (USA)
Hong Kong SAR	Hong Kong Special Administrative Region
IPRs	intellectual property rights
LAOSC	Legislative Affairs Office of the State Council (PRC)
M&A	mergers and acquisitions
Macau SAR	Macau Special Administrative Region
MII	Ministry of Information Industry (PRC)
MNC(s)	multinational corporation(s)
MOFCOM	Ministry of Commerce (PRC)
MOFTEC	(Former) Ministry of Foreign Trade and Economic Cooperation (PRC)
MOR	Ministry of Railways (PRC)
NBS	National Bureau of Statistics (PRC)

NDRC	National Development and Reform Commission (PRC)
NDPC	(Former) National Development and Planning Commission (PRC)
NPC	National People's Congress (PRC)
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading (UK)
PboC	The People's Bank of China (PRC)
PRC	The People's Republic of China
RMB	Renminbi (Chinese Currency)
RPM	resale price maintenance
SAFE	State Administration of Foreign Exchange (PRC)
SAIC	State Administration for Industry and Commerce (PRC)
SARFT	State Administration of Radio, Film and Television (PRC)
SASAC	State-owned Assets Supervision and Administration Commission (PRC)
SAT	State Administration of Taxation (PRC)
SC	State Council (PRC)
SCNPC	Standing Committee of the National People Congress (PRC)
SERC	State Electricity Regulatory Commission (PRC)
SETC	(Former) State Economy and Trade Commission (PRC)
SFDA	State Food and Drug Administration (PRC)
SIPO	State Intellectual Property Office (PRC)
SME(s)	small and medium-sized enterprises
SOA	State-owned assets
SOE(s)	State-owned enterprise(s)
SPC	The Supreme People's Court (PRC)
SPB	State Post Bureau (PRC)
STMA	State Tobacco Monopoly Administration
WFOE(s)	wholly foreign-owned enterprise(s)
WTO	World Trade Organization

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1
Introduction

1.1 The Thesis and its Objectives

This thesis presents a research on competition law and policy of the People's Republic of China (the PRC) in transition. It focuses on the Mainland China and does not provide in-depth research on competition law and policy of the *de jure* separate jurisdictions of Hong Kong and Macau and the *de facto* separate jurisdiction of Taiwan. However, comparative analyses on competition regimes of the four jurisdictions are conducted where necessary. For the purpose of this thesis only, the use of the abbreviation PRC denotes the Mainland China and does not include Hong Kong SAR, Macau SAR, and the Taiwan Region.

The thesis assesses the Anti-Monopoly Law 2007 (AML 2007), the Anti-Unfair Competition Law 1993 (AUCL 1993) and other competition-related laws and sectoral regulations of the PRC. Through exploring the interaction between Chinese competition law and policy and the social, political, and economic environment in which the law and policy has developed, the thesis questions an all-or-nothing perspective towards Chinese competition law and policy, and illustrates how competition law and policy affects marketplace and governance of the PRC.

One of the feature of this thesis is that it blends an analysis of competition law and policy with a broader investigation into the social and political context in which the law and policy has developed. A fundamental point to be borne in mind is that legal and executive orders are embedded in specific political systems.[1] Thus, this writer

[1] In *The Spirit of the Laws*, Montesquieu relied on the nature of a government to determine the nature of law implemented by that government and concluded that culture and law are not readily transferable among nations with radically different endowments and governmental structures. See, Anne M Cohler and others (eds & trs): *Montesquieu: the Spirit of the Laws* (Cambridge University Press, Cambridge 1989) 231-336, 477-78, and 494-518. Modern sociologists further argue that ideas and theories are not universal, but are embedded in a specific temporal, physical and social setting that permits them to flourish. See, Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Anchor Books, Garden City, NY 1966) 18-46.

places an emphasis on political-economic analysis, prominent amongst which are the crucial role of state structure and ideology in shaping patterns of competition authorities and effects of competition law and policy.

1.2 Competition Law Transplantation

A limit of this thesis is that it is impossible to be value-free. Nevertheless, the thesis aims to develop an objective understanding of the legal and non-legal reasons for the progressive development of Chinese competition law and policy. This writer attempts to answer a series of questions as follows. Why EC competition law as a model is most extensively used by Chinese legislators? How the legislators adopt the EC model in the way they are doing considering the intense legislative debates and unavoidable political dilemmas? How are the legislators about to design competition authorities in a still authoritarian and negotiated state? Furthermore, to what extent can one understand Chinese competition law and policy through a three dimensioned analysis which examines formal rules, informal constraints, and enforcement characteristics?[2] By so doing, the thesis elaborates how competition law and policy is transplanted in a transitional PRC and how such law and policy affects the marketplace and governance of the receiving jurisdiction.[3]

1.2.1 Legal Transplant

In 1974, Alan Watson used the term 'legal transplant' the first time and defined the concept as 'the moving of a rule or a system of law from one country to another'.

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[2] Such three dimensioned analytical framework is inspired by *Institutions, Institutional Change and Economic Performance*, a seminal book written *by* institutional economist Douglass C North (1993 Nobel Laureate in economics). In this book, North defines 'institutions' as 'the rules of the game in a society' or 'the humanly devised constraints that shape human interaction'. North argues that institutions 'structure incentives in human exchange, whether political, social, or economic. Institutional change shapes the way societies evolve through time and hence is the key to understanding historical change'. In his analysis, North includes both formal constraints (e.g., rules) and informal constraints (such as conventions, customs, traditions, and codes of behaviour) and enforcement. See Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge 1990) 1-60, esp. 3, 36, 46, and 54.

[3] The term 'marketplace' is chosen in order to avoid confusion with the concept 'relevant market'. A marketplace is understood as any arrangement that enables buyers and sellers to obtain information and to decide price and quantities of the transaction. In other words, the marketplace connects parties together and therefore allows them to close deals by helping to reduce transaction costs. Traditionally, marketplace can be physical locations such as local open markets. In the modern world, following the start of the e-commerce era, many marketplaces are now networks within which people trade through telephone, fax or the Internet. See, Michael Parkin and others, *Economics* (5th edn Addison-Wesley, Harlow 2003) 32-33.

Watson observed paradoxes of law from a comparative perspective. On the one hand, remarkable differences in important detail exist between even closely related systems because 'a people's law can be regarded as being special to it, indeed a sign of that people's identity'. On the other hand, legal transplants 'have been common since the earliest recorded history',[4] because legal systems have seldom developed in a clear separation from each other.

Since the end of the 1980s, 'free trade in legal ideas'[5] has considerably increased across borders and cultures. Such multi-jurisdictional legal transplants have been a result of various factors and considerations such as the collapse of the communist system in Eastern Europe, and the demand for free trade and harmonised rules on IPRs.[6] A direct and main advantage of legal transplant is savings in resources because technically speaking, it is cost-efficient to copy existing rules than to reinvent the wheel, and practical experience from the donor's model may often be available at no extra or substantial expense. However, it is noted that original meanings can be lost or twisted while divergences may begin during the mere process of translation. Furthermore, once imported law find its place in a new environment, legal ideas borrowed from the donor's model is subject to further changes due to conceptual differences, linguistic barriers and different political, economic, socio-cultural parameters. It is also noted that legal transplantation is easier in areas of the law that are more technical in nature such as the data protection and traffic law. Yet, the result becomes far less predictable if policy considerations and fundamental values involve in the process of legal transplantation.[7]

It was observed that '[s]ocieties largely invent their constitutions, their political and

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[4] Alan Watson, *Legal Transplant: an Approach to Comparative Law* (Edinburgh, Scottish Academic Press, 1974) 21. A detailed explanation of Watson's comparative law theory is provided by W Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) *American Journal of International and Comparative Law* 489.

[5] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law', (1974) 37 *Modern Law Review* 1-27, 10.

[6] Jorg Fedtke, 'Legal transplants', in J M Smits (eds), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing, Cheltenham 2006).

[7] *Fedtke* (n 6) (435-36).

administrative systems, even in these days their economies; but their private law is nearly always taken from other'.[8] Since the end of the 1980s, however, the phenomenon of legal transplantation has gone much beyond the areas of private law. For example, post-communist constitutions of eastern European countries were drafted on the basis of extensive borrowing from Western models.[9] Considering that competition law reflects hybrid features of both public and private law,[10] the ongoing transplantation of competition law all over the world further contributes to the complexity of legal transplantation, especially in those emerging democracies and economies.

1.2.2 Transferability of Available Competition Law Models

Legal transplantation is a dynamic process and many factors contribute to the success of a specific legal transplant example. Montesquieu, one of the earliest scholars who questioned the transferability of national law, stated that '[l]aws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another'.[11] However, Watson was of the opinion that successful legal transplant 'could be made from a very different legal system, even from one at a much higher level of development and of a different political complexion'.[12] When speaking of competition law, scholars have discussed the transferability of available competition law models, especially by comparing the US antitrust law and the EC competition law.[13]

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[8] S F C Milsom, *Historical Foundations of the Common Law* (Butterworths, London 1969) ix.

[9] Dupre provides a detailed investigation on Hungarian's experience on importing the various components of the rights to human dignity from German law. See, Catherine Dupre, *Importing the Law in Post-Communist Transitions: the Hungarian Constitutional Court and the Right to Human Dignity* (Hart Publishing, Oxford 2003)

[10] When analyzing the basic conceptions of competition law, Gerber notes that '[i]n one, competition law tends to be viewed as a device for framing and protecting private rights. In the other, it is understood primarily as part of public, administrative law – and associated with the regulatory goals of the state. These conceptions clash in fundamental ways, and they influence choices about what to do in specific situations'. See, David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1st paperback edn Oxford University Press, Oxford 2001) x.

[11] Anne M Cohler and others (eds & trs): *Montesquieu: the Spirit of the Laws* (Cambridge University Press, Cambridge 1989) part 1 book 1 ch 3.

[12] Alan Watson, *Legal Origins and Legal Change* (Hambledon Press, London 1991) 293.

[13] For example, see Dabbah's discussion on 'Model Systems on Antitrust', at, Maher M Dabbah, *The Internationalisation of Antitrust Policy* (Cambridge University Press, Cambridge 2003) 273- 276.

It is the fact that most competition law of the contemporary world derives more or less directly from either the US antitrust law or the European competition law. As will be discussed in detail in the following chapters, the PRC has chosen the EC model as a benchmark when drafting the AML. However, over the years, Chinese competition law and policy have also developed its local discourse and rhetoric. For example, 'administrative monopoly' and 'monopoly contract', as two peculiar concepts reflecting Chinese *guoqing* (national conditions), were created during the legislative process of the AML.

1.3 The Conceptual Framework

In this section, a number of concepts will be defined, insofar as they are relevant to the subject matter of this thesis. Defining these concepts aims to explain what the general views have been and how these concepts are perceived in the Chinese context and for the purpose of this thesis.

1.3.1 Chinese Competition Law and Policy

In order to define Chinese competition law and policy, one may start by reviewing the concepts of competition, competition law and competition policy.

As observed by commentators, the literature on competition is made obscure by the fact that 'some of its components deal with competition in one sense, some in another'.[14] For the commercial world, competition is the principal force in the marketplace. It can be viewed as a process of rivalry that enables market actors as customers have the choice between different suppliers and as suppliers the choice between different customers. Thus competition may be regarded as an instrument which creates freedom of choice and, at the same time, checks market power.[15]

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[14] Stephen Martin, 'Globalization and the Natural Limits of Competition' in M Neumann and J Weigand (eds), *The International Handbook of Competition* (Edward Elgar Publishing, Cheltenham 2004) 49.

[15] Christian Krichner, 'Competition Policy versus Regulation: Administration versus Judiciary', in *Neumann and Weigand* (n 2) 307.

Therefore, competition in the marketplace promotes equal opportunity.

Competition is evolutionary in substance, dynamic in form and is adaptable to suit time and circumstance.[16] In part because of this feature, competition has become a 'political, legal and economic chameleon'.[17] In Western civilization, competition has been both God and devil because it has provided wealth and economic progress but it has also changed distribution of wealth and threatened communities and ethics.[18] As suggested by Hobbes in his *Leviathan*, unfettered competition of countless individuals is a struggle of everybody against everybody (*homo lupus hominem est*). 'Organising the economy on the basis of competition is an ideological choice'.[19] In the PRC, traditionally there was no space for a competition culture to thrive. Since the establishment of the PRC in 1949, competition had been painted in a negative colour, perceived as a capitalist monster, and criticized relentlessly by the prevailing ideology until the late 1970s.[20] Now however, competition is universally accepted as an essential mechanism that delivers efficiency and innovation to and from the marketplace. Nevertheless, although market does not need to work perfectly to work better than government regulation, history taught us that both competition and market cannot be simply left to an autopilot. Primarily based on this consensus the proliferation of competition law and policy has become a global phenomenon.

Nevertheless, competition law is a difficult concept to define thoroughly and undisputedly, as well as competition policy. Because of the evolving nature of competition and the changing balance of market and government, different definitions have been given to these two concepts over the years. This writer defines competition law as a system of economy-wide legal rules (subject to statutory exceptions) that

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[16] Maher M Dabbah, *EC and UK Competition Law* (Cambridge University Press, Cambridge 2004) 2-3.

[17] Sonya Margaret Willimsky, 'The Concept(s) of Competition' (1997) 1 ECLR 54.
[18] *Gerber* (n11) 1.

[19] Brenda Sufrin, 'Competition Law in a Globalised Marketplace: Beyond Jurisdiction' in Patrick Copps and others (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing, Oxford 2003) 105.

[20] Xiaoye Wang, *Qiye Hebing zhong de Fanlongduan Wenti* (Antimonopoly Issues of Concentrations of Undertakings) (The Law Press, Beijing 1996) 137-138.

addresses market imperfection in order to protect the process of competition from distortion and restriction.

It is noteworthy that the scope and the titles of competition law can be different across jurisdictions. The substantial issues of competition law normally include rules on restrictive agreements, abuse of dominance and merger control. However, in some jurisdictions, for example, the PRC and the Taiwan Region, competition law also deals with unfair competition practice.[21] Furthermore, a variety of titles, such as antitrust law and fair trading law, have been given for competition law.[22] These different titles 'generally reflect the hierarchy and objectives of the law, as well as the legal traditions of the jurisdictions concerned'.[23] However, one may ask whether these different titles actually refer to the same subject matter. Another important question is that these different titles may also imply the interface and tension between the term 'competition law' and 'fair trading' or 'unfair competition law'. For example, when examining the German competition law history, Gerber writes:

> ...it should be noted that the German legal system contains a highly developed and much used area of law called 'unfair trade law' that has conditioned the development of the competition law system. This system preceded the GWB (the current law was enacted in 1909), and prior to enactment of the GWB, the term 'competition law' (Wettbewerbsrecht) was used to refer to it. Today, that term is used generally to refer to both areas of law, with the term 'Kartellrecht' (cartel law) designating the area of law that we treat in this book.[24]

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[21] See 3.1.2 and 3.2, below.

[22] Antitrust law is the US name for competition law but the EC Commission also uses the term 'antitrust' referring to the areas of competition law including restrictive agreements and abuse of dominance but excluding merger control and state aid. See the European Commission's Website <http://ec.europa.eu/comm/competition/index_en.html>, and, Alison Jones and Brenda Sufrin, *EC Competition Law: Text, Cases, and Materials* (2nd end Oxford University Press, Oxford 2004) 2.

[23] More examples include the Act to Regulate Competition and Provide for Fair Trading (Malta), Federal Law on Economic Competition (Mexico), Law on Prohibiting Unfair Competition (Mongolia), Law to Promote and Protect the Exercise of Free Competition (Venezuela). See UNCTAD, *Model Law on Competition* (United Nations, New York and Geneva 2004) Document No TD/B/RBP/CONF.5/7/Rev.2, 11 and 90.

[24] *Gerber* (n 11) 277.

Gerber also notes that unfair competition law is aimed at protecting competitors because it provides undertakings 'with a right to sue their competitors for impairment of their capacity to compete'. Unfair competition law was and continues to be understood as private law. However, unfair competition law was connected with the idea of 'purifying' the competitive process. Such idea facilitated 'the perception that the process required protection, and this, in turn, supported the idea of a generalized legal regime to provide such protection'. Therefore, unfair competition law played a positive role in preparing the way for competition law.[25]

Competition policy is understood in the given context as a system of law and policy, both economy-wide and sector-specific, to protect competition and to be enforced by the competition authorities (including sectoral regulators under given conditions) and the law courts.[26] Therefore, the concept of competition policy is different with the concept of competition law in two aspects. Firstly, competition policy places more weight on administrative and juridical enforcement. Secondly, competition law is a principal component of competition policy. However, the substantial scope of competition policy is broader; under its name the interaction between competition law and other forms of regulation, particularly sectoral regulations, can be observed and assessed.

As the subject matter of this thesis, the concept of Chinese competition law and policy refers to a system of legal and regulatory rules, both economy-wide and sector-specific, and the rules implementation. Such system aims to protect and/or regulate the competitive behaviour and competitive process within and, under certain criteria, outside the PRC.[27]

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[25] *Gerber* (n11) 37-39.

[26] Competition law can be enforced by private parties in some jurisdictions, such as the USA, under certain conditions. See 8.4.2, below, for discussion on private enforcement of competition law in China.

[27] See 3.4.1, below, for discussion on the effects doctrine in China.

1.3.2 Sectoral Regulations (*Bumen Fagui*)

Whereas competition law constitutes a system of legal rules applicable to all sectors (subject to certain statutory exceptions), sectoral regulations concern specific industries, particularly those 'regulated industries'.[28] In the Chinese context and for the purpose of this thesis, the term 'sectoral regulations' refers to 'basic laws' (*jiben falu*), 'administrative regulations' (*xingzheng fagui*), and ministerial rules (*bumen guizhang*) which are enforced by regulatory agencies and the law courts on a sector-specific basis, for example, the Postal Law 1986, the Electric Power Law 1995, the Railway Law 1990, and the Telecommunications Regulations 2000.[29] Sectoral regulations normally include competition-related rules, a fact which has resulted in concurrent jurisdictions between competition authorities and sectoral regulators. It is therefore necessary to discuss sectoral regulations when examining Chinese competition law and policy.

1.3.3 Regulation (*Jianguan*), Regulated Industries (*Jianguan Chanye*) and Regulatory Reform (*Jianguan Gaige*)

The term 'regulation' is used generically to refer to government intervention into the marketplace through a system of economy-wide and/or sector-specific policy tools.

Some commentators regard competition law and policy as a form of regulation. For example, it is noted that '[c]ompetition policy must be integrated into the general policy framework for regulation.'[30]

However, others believe competition policy is different from regulation. For example, economists believe that:

> Regulation applies to special sectors, whose structure is such that one

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[28] See 1.3.3, below, for discussion on the concept of 'regulated industries'.

[29] See 2.4, below, for discussions on the sources and hierarchy of Chinese law, the Chinese concepts of 'basic laws' (*jiben falu*), 'administrative regulations' (*xingzheng fagui*) and 'ministerial rules' (*bumen guizhang*), and the relationship between 'sectoral regulations' (*bumen fagui*) and 'ministerial rules' (*bumen guizhang*).

[30] See OECD, *the Background Report on the Role of Competition Policy in Regulatory Reform (Korea)*, (OECD, Paris 1999) 3, available at <http://www.oecd.org/dataoecd/2/44/2497300.pdf>; also see E Thomas Sullivan and Herbert Hovenkamp, *Antitrust Law, Policy and Procedure: Cases, Materials, Problems* (5th edn LexisNexis, 2003) 973.

would not expect competitive forces to operate without problems. Regulation would usually concern markets where fixed costs are so high that no more than one firm would profitably operate (a so-called natural monopoly); example might be electricity (transmission phase), telecommunications (local loops) and railways (the network).[31]

Parkin and others argue that 'the government intervenes into markets to influence prices, quantities produced and the distribution of wealth. The government intervenes in three main ways, namely regulation, competition policy, and public ownership'. They define regulation as 'rules enforced by government agencies to restrict or control economic activity in price setting, product standards, trading standards and the conditions under which firms can enter an industry.'[32]

People who deem competition policy and regulation as different tools further observe a series of distinctive features between competition policy and regulation. First of all, while competition authorities generally limit themselves to checking the lawfulness of firms' activities, industry regulators have more extensive powers (they might impose or control firms' prices, investments, and product choices). Secondly, while competition authorities usually intervene ex post (for instance, checking the legality of a certain business practice after it has already been taken), regulators act ex ante (for instance, authorizing a certain business practice or not). Regulators' involvement within an industry is long-run and continuous, whereas competition authorities' interventions tend to be occasional. Such differences are also mirrored in the theoretical frameworks adopted to deal with these two issues. While competition policy issues can mostly be analyzed by using oligopoly theory, regulatory issues are more frequently addressed by the so-called 'principal-agent models', where the principal is the regulatory authority and the agent is the regulated firms, with the former having to devise incentives in order for the latter to take the actions that would

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[31] Massimo Motta, *Competition Policy* (Cambridge University Press, Cambridge 2004) xviii.

[32] *Parkin and others* (n 1) 363.

achieve the principal's objectives.[33]

The term 'regulated industries' is less controversial which refers to sectors where entry conditions, pricing, operation, and/or distribution of the gains are administered substantially by governmental agencies. In a regulated industry, business activities are controlled to a more or less extent by legislative or governmental agency decisions rather than by free competition.

The scope of regulated industry is varied across jurisdictions and time. For example, in Mao's China, virtually every industry was regulated, planned and output proportioned. The scope was extended to every aspect of daily life, including clothing, shelter, transportation and most foodstuffs. Today, regulated industries can be found in natural monopolies, sectors related to the existence of information asymmetries, and/or sectors which are in a transitional phase, for example the formerly state-owned and subsequently liberalized sectors. Examples of regulated industries include financial services, telecommunications, energy, public utilities and transport, etc.

It may be noted that, in the contemporary world economy, almost no industry is completely free of government intervention. Meanwhile, there are few regulated industries in which competition plays no role. As a result, competition law and policy 'has found a place in most of the regulated industries'.[34] More recently, there has been a growing skepticism about the rationales for regulated industries. The past thirty years have seen regulatory reform or deregulation becoming a worldwide trend which means 'the process of removing restrictions on prices, product standards and types, and entry conditions.'[35]

1.4 The Methodology

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[33] *Motta* (n 15) xviii.

[34] *Sullivan and Hovenkamp* (n 14) 974.

[35] *Parkin and others* (n 1) 363 and 823.

Competition law is interdisciplinary in nature.[36] The thesis aims to present a broader picture within which formal rules, informal constraints, and enforcement characteristics of Chinese competition law and policy are perceptible through a prism of cultural-historical, political, comparative, and institutional analyses. Furthermore, empirical methods (through interviews and questionnaire survey applied during a field research in the PRC) are used whenever it is appropriate. [37]

For example, regarding political analysis of competition policy, based on literature on comparative public policy and competition policy, Doern and Wilks observe that four levels of political analysis may be applied to understand the political economy of competition policy in OECD countries.[38] Based on Doern and Wilks' model, this writer suggests three levels of political analysis (see Figure 1.1, below) which may facilitate the understanding of Chinese competition law and policy.

Figure 1.1 Levels of Political Analysis in Chinese Competition Law and Policy[39]

[36] Maher M Dabbah, 'Measuring the success of a system of competition law' (2000) 21 ECLR 369.

[37] A series of literatures written in Chinese has been referred throughout this thesis. Translations of the titles, quotes, and sources were conducted by this writer. Throughout the footnotes, authors of Chinese literatures referred are given in the traditional Chinese name order, namely, the family name being first. However, in the bibliography, all family names are listed first, followed by initials of given names.

[38] The four levels analysis includes: 'the macro-politics of competition policy, or the identification of aggregate factors which help explain why overall competition policies are the way they are in each country; the meso-level of institutional politics, including overall decision-making processes; the micro-politics of policy implementation and enforcement; and the emerging dynamics concerning the internationalization of competition policy, the politics of system frictions' See, G Bruce Doern, 'Comparative Competition Policy: Boundaries and Levels of Political Analysis' in Bruce Doern and Stephen Wilks (eds), *Comparative Competition Policy: National Institutions in a Global Market* (Clarendon Press, Oxford 1996) 20-21.

[39] Adapted from *Doern and Wilks*, (n 35) 20-21.

1. Macro-politics (Factors explaining Chinese competition law and policy)

1.1 A transitional political regime under the control of the Chinese Communist Party (CCP)

1.2 Ideologies and ideas: socialist market economy and socialist democracy

1.3 Business interests and policy community influence

1.4 Interests and strategies of core competition agencies

2. Meso-politics (features of institutions and overall decision process)

2.1 Jurisdiction and degree of autonomy

2.2 Incorporation of economic and legal ideas and cultures

Discretionary elements:

2.3 Non-competition criteria

2.4 Ministerial and quasi-ministerial discretion

2.5 Hearings and direct interest representation

2.6 Opportunities for private action

2.7 Vehicles for study, inquiry, and media exposure

3. Micro-politics (implementation, compliance, and enforcement)

3.1 The nature of implementation activity embedded in a mix of policy instruments

3.2 Fairness and transparency

1.5 The Structure

This thesis includes nine chapters. Chapter 1 contains an introduction to objectives, conceptual framework, methodology and structure of the thesis. Chapter 2, by examining the changing state institutions and legal thoughts, analyses the 'ecological environment of Chinese competition law and policy', including the incentive ('seeds'), the socio-economic ideology ('soil'), the institutional conditions ('sun and water'), and the political economy conditions ('pesticides').[40] The ecological environment sets a unique and intricate context for the investigation and assessment of the following chapters. Chapter 3 traces the historical developments, transplantation and localisation process of the Chinese Anti-Unfair Competition Law 1993 (AUCL) and the Chinese

[40] The term 'ecological environment of Chinese competition law and policy' is inspired by Michel Gal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries', in UNCTAD, *Competition, Competitiveness and Development: Lessons from Developing Countries* (United Nations, New York and Geneva, 2004) 29, Document No. UNCTAD/DITC/CLP/2004/1. Gal noted that '... the mere adoption of a competition law is a necessary but not sufficient condition for it to be part of market reform. Just as ecological conditions determine the ability of a flower to bloom, so do some preconditions affect the ability to apply a competition law effectively.'

Anti-Monopoly Law 1997 (AML). The chapter is a foundation upon which in-depth investigations on Chinese competition law and policy and its interface with relevant laws and rules are provided. Chapter 4 begins by assessing of the concept, the underlying reasons, and the substantive rules on abuse of administrative power to restrict competition in the PRC. After discovering fundamental feature of Chinese domestic market - a cellular market with widespread sectoral monopolies and local protectionism or regional blockades, a step by step proposal is followed which argues that the concept 'administrative monopoly' should be replaced by available alternatives. Furthermore, by analysing EC jurisprudence on state monopolies and revealing similarities and differences of state monopolies between the EC and the PRC, this chapter assesses the potential value and relevance of the EC experience to the PRC. Through analyzing vertical and horizontal restrictive behaviour in the PRC, relevant rules of the AML and other legal and regulatory tools, and experience of other jurisdictions, Chapter 5 provides answers on how the AML is about to regulate restrictive agreements in the Chinese domestic market. Chapter 6 provides an analysis on abusive behaviour of enterprises in the PRC, especially those of the regulated industries, and offers proposals on a workable analytical framework for Chinese regulators. Case study of litigation between Intel, Sony and Chinese domestic enterprises is provided. This chapter also examines the interface between Chinese competition law and IP and contract law. By analysing basic concepts, notification thresholds, substantive appraisal test, and enforcement mechanism of Chinese merger control regime established by the 2003 and 2006 M&A Rules and the AML, Chapter 7 examines the potential conflicts between merger control law and industry and trade policy of the PRC and a possible approach to minimize the confrontation. Chapter 8 analyses an unclear relationship between the AML procedure on the one hand, and Chinese litigation rules and legal-political reality on the other. It answers whether a judicial check on AML agency's decisions is illusory and whether there is space for AML private enforcement. Finally, concluding remarks on Chinese competition law and policy, in general, and on the AML, in particular, are provided by Chapter 9.

The law is as stated at 30 August 2007.

2

The Context: the Changing State Institutions and Legal Thoughts

> Here the question is 'What kind of society do we want and how can competition law help to achieve it?' The question and the discourse surrounding it are political and often symbolically charged.
>
> David Gerber[41]

As a new field of social endeavour, competition law and policy represents a component in the relationship between government and society. It also represents a distinct combination of juridical, economic, and political matters.[42] Faced with internal and external pressure to protect and regulate competition, the PRC has been transplanting and localizing competition law and policy since the early 1980's. This process demonstrates an intricate story of both convergence and divergence. One may ask what factors explain the *status quo* or predict future developments. As observed by Institutionalists, although formal rules may change quickly as the result of political or judicial decisions, informal constraints embodied in customs, traditions, and codes of conduct are much more impervious. Such informal constraints not only connect the past with the present and future, but also provide us with a key to explaining the path of historical change.[43]

This chapter does not intend to answer the normative question asked by Gerber. On the contrary, the chapter provides an overview of an important aspect of the Chinese *guoqing* (national conditions), namely, the evolution and *status quo* of state institutions

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[41] David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1st paperback edn Oxford University Press, Oxford 2001) 418.

[42] *Gerber* (n 1) ix, xv, 417.

[43] Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge 1990) 6.

and legal thoughts of the PRC. By so doing, the incentive ('seeds'), the socio-economic ideology ('soil'), the institutional conditions ('sun and water'), and the political economy conditions ('pesticides') of Chinese competition law and policy are presented.[44] The chapter is a foundation upon which the interaction between competition and regulation of the PRC will be explored in the following chapters.

2.1 Background

As the world's most populous country, China has the most enduring history for millennia and has a written history dated from the Xia Dynasty (2100-1600 B.C.). In 221 B.C., the Qin Emperor (*Qin Shi Huang*) created an imperial bureaucracy that constituted the basic institutional framework of a centralized political system. The feudalist China established an authoritarian tradition through which the society was governed through a complex social stratum, supported by bureaucratic elite, and rationalized by the Confucian philosophy of harmony, loyalty, benevolence, and piety. The feudalist China was the longest-lasting major system of government in the world history, which lasted over more than two thousand years until the collapse of the last dynasty Qing, in 1911. Since then, China has been transformed from an imperial monarchy to a short-lived republic established by Kuomintang (the National People's Party), then to a revolutionary state socialism and finally to an era of economic transition. The country's economy has undergone repeated shifts from unparalleled crisis to rapid modernization. The society and culture were sundered by foreign invaders and profound class struggle, and have subjected to an everlasting feast of 'Isms' where Confucianism, socialism, capitalism and liberalism have impacted the marketplace, the society and the governance.[45]

The past 100 years has also witnessed China going through an iconoclastic transformation since the nation once served as a laboratory for theories on the

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[44] Michel Gal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries', in UNCTAD, *Competition, Competitiveness and Development: Lessons from Developing Countries* (United Nations, New York and Geneva, 2004) 29, Document No. UNCTAD/DITC/CLP/2004/1.

[45] Ray Huang, *China: a Macro History* (M. E. Sharpe, New York 1990); Melanie Manion, 'Politics in China' in Gabriel Almond and others (eds), *Comparative Politics Today: a World View* (8th edn Pearson Longman, New York and London 2006) 422.

functioning of a command economy and a totalitarian society. Karl Marx predicted capitalism would inevitably lead to socialism. He wrote extensively about the faults and evils of capitalism, but left no blueprint for the promised socialist heaven. Socialist opponents argued that socialism simply could not work. The Chinese experience proved that the two schools were both problematic and their theories are open to further explanation.

The socialist planned economy prevailed in the PRC from its establishment in 1949 until 1978. Since the late 1970s, the PRC has been in a transition from a planned economy to a market economy. One of the major surprises in economic development during the last three decades is the rapid growth of the Chinese economy. By opening the market, accepting private wealth and allowing competition under its socialist political structure, the PRC has been becoming one of the most promising emerging economies in the world. Remarkable economic progress has been made against a backdrop of much more limited political reforms. The robust performance of the Chinese economy has surprised observers almost as much as did the collapse of the Soviet economy. Many are watching carefully to see if China can stay on its fast-growth track. The emerging economy also facilitates the development of a civil society, in which individuals are independent from the state step by step, and the nation and its people are increasingly becoming integrated into the international society.

Having decided to take the road back to a market economy, the PRC has a challenging path to follow. For example, although the ruling elite has been working hard to reconcile its political ideology with the benefits of the thriving market economy, the continuing invocation of socialist values in an increasingly capitalist society has deepened cynicism, permitting neither socialist nor capitalist values to gain a strong foundation.[46] Furthermore, transition to the market required setting up a legal framework for the market, breaking up the pervasive state monopolies, privatisation, and opening up the economy to international competition. Therefore, the transition

[46] Xiaoying Wang, 'The Postcommunist Personality: The Spectre of China's Market Reforms' (2002) 47 *The China Journal* 1, 3.

requires the state to change from a custodian of society and a *dirigiste* role to a much smaller and flexible one. The state is expected to determine, arbitrate, and enforce the rules of the game, as these functions cannot be done by market itself. In this regard, it is useful to consider the role of the state institutions and an overview of these bodies is set out below.

2.2 The Chinese Communist Party

Founded in July 1921, the Chinese Communist Party (CCP) is the single ruling party and the largest political power in the PRC, with a membership of approximately 72.4 million by the end of 2006.[47] From the government and the military forces to the judiciary and the legislature, virtually all important positions are held by the CCP members. Therefore, the CCP in fact controls, to a significant extent, most state powers of the PRC. The Central Committee of the CCP holds the final decision-making power of the Party. Although not a legislative organ under the Chinese Constitution, the Central Committee of the CCP has substantial influence over the legislative process due to the fact that the Chinese Constitution is based on the 'Four Fundamental Principles', one of which is the CCP's leadership.[48]

It has been noted that all communist regimes suffer from the problem of party penetration into state affairs.[49] In China this problem has been particularly acute. Most of the 'second generation' of Chinese political leaders, including Deng Xiaoping, Peng Zhen, and Chen Yun, were victims of the Cultural Revolution, an unprecedented disaster that was able to occur in part because of the highly centralized and inter-connected system of the CCP and the state. These leaders had a strong motivation to change this aspect of the political system, and the separation of government from the CCP has become a major reform goal. However, such a reform is hazardous for the Party since, by withdrawing the functions of government from the CCP's direct control,

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[47] Xinhua News Agency, '2006 Nationwide Statistics of the Chinese Communist Party' (9 July 2007) <http://news.xinhuanet.com/politics/2007-07/09/content_6351047.htm> last accessed 9 October 2007.

[48] The 'Four Foundational Principles' refer to 'the socialist road, people's democratic dictatorship, the leadership of the CCP, and Marxism-Leninism and Mao Zedong Thought'.

[49] Tony Saich, *Governance and Politics of China* (2nd edn Palgrave Macmillan, Basingstoke 2004) xv.

it constitutes a potential threat to the CCP's commanding status. Within the CCP, a great deal of energy has been invested into the search for a possible balance between preservation of the Party's dominant position, on the one hand, and promotion of an autonomous and efficient role for the government institutions, on the other.

Prior to the 1980s, there was virtually no division of functions between the CCP, the legislature, the executive and the judicial system. Party organs were in charge and pushed aside the legislative and the judiciary in implementing policy. Some progress has been made since the 1980s in the position of legislature and of the judicial system. For instance, CCP organs at various levels have disbanded their units that overlapped with government institutions. Also, an administrative responsibility system has been established for heads of government at various levels, and for their departments. Another noteworthy change puts government firmly in charge of issues of ordinary daily administrative work, but leaves the CCP committees at various levels in control of matters deemed important and politically sensitive. The obvious contradiction between these changes lies in the difficulty in establishing formal procedures that may in practice conflict with the real distribution of power.

However, the legal developments during the past three decades have shown signs of the development of an institutionalized legislature in which that the CCP's control over lawmaking is less centralized and unified than that has been supposed by Western analysts.[50] The transitional China has therefore become a unique regime in which the ruling party has demonstrated exceptional skills in loosening its control of economy and giving priority to development while reserving its political leadership of the society. Tensions between the present political structure and the society and governance have been observed over the years. In fact, as one can see from the following chapters, the PRC has faced a 'long, arduous process' when transplanting and localising its competition law and policy under the current context.[51]

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[50] Murray S Tanner, 'The Erosion of Communist Party Control over Lawmaking in China' (1994) 138 *The China Quarterly* 381, 402.

[51] Jared A Berry, 'Anti-Monopoly Law in China: A Socialist Market Economy Wrestles with its Antitrust Regime' (2005-2006) 2 *International Law and Management Review* 129. Also see, Maher Dabbah, 'the Development of

2.3 The Executive

Contemporary China has a five-tiered executive structure which comprises, from the top to the bottom, the central, provincial, municipal, county, and village levels.

2.3.1 The Central Government: the State Council

The State Council (SC), also known as the central government, is the highest organ of the Chinese administration and is composed of a premier, vice-premiers, state Councillors, ministers in charge of ministries and commissions, and the auditor-general and the secretary-general. The work of the SC is presided over by an executive board (*Changwu Huiyi*) composed of the premier, vice-premiers, state councillors and the secretary general.[52]

As the executive organ of the NPC, the SC is responsible and accountable to the National People's Congress (NPC) and its Standing Committee (SCNPC).[53] It is able to submit bills to the NPC or the SCNPC as well as to formulate administrative regulations in accordance with the 'basic laws',[54] to proposed and implement the national plans and state budget, and to oversee public order, etc. Beside the General Office, there are various ministries, commissions, offices, administrations and bureaus under the SC.

Sound Competition Law and Policy in China: An (Im)possible Dream?' (2007) 30(2), *World Competition* 341, 343-344. In this article, Dabbah observes the contradiction of 'a politically monopolised government is in the process of enacting a law aimed at prohibiting economic monopolistic behaviour and 'abuse' of administrative powers to restrict competition', and asks if 'competition law could find a niche in contemporary China'.

[52] XIANFA (Constitution 1982) arts 85 – 89.

[53] See 2.4, below.

[54] For the concept of 'basic laws' see 2.2.2, below.

Figure 2.1 The Composition of the State Council as at August 2007[55]

Ministries and Commissions (total no. 28) e.g. National Development and Reform Commission (NDRC), Ministry of Commerce (MOFCOM), Ministry of Justice (MOJ), Ministry of Communications (MOC), Ministry of Information Industry (MII), People's Bank of China (PboC)
Special Organisation directly under the SC (total no. 1) State-owned Assets Supervision and Administration Commission (SASAC)
Organisations directly under the SC (total no. 8) e.g. State Administration of Industry and Commerce (SAIC), General Administration of Civil Aviation (CAAC), State Intellectual Property Office (SIPO), State Administration of Radio, Film and Television (SARFT)
Offices (total no. 4) e.g. the Legislative Affairs Office (LAO)
Institutions (total no. 14) e.g. Xinhua News Agency, China Banking Regulatory Commission (CBRC), China Securities Regulatory Commission (CSRC), China Insurance Regulatory Commission (CIRC), China Electricity Regulatory Commission (CERC)
Administrations and Bureaus under Ministries and Commissions (total no. 11) e.g. State Tobacco Monopoly Administration (STMA), State Post Bureau (SPB), State Administration of Foreign Exchange (SAFE)

2.3.2 The Local Government

The local government is administered through 23 provinces (including the Taiwan Region), 5 autonomous regions, 4 municipalities directly under the central government, and 2 special administrative regions (SARs) including Hong Kong and Macau.

[55] Data source: <http://english.gov.cn/links/statecouncil.htm> last accessed 9 October 2007. Such composition was the outcome of the reorganization after President Hu Jintao and Primer Wen Jiabao took the leadership in 2003.

Since the 1980s, the government has initiated four rounds of reform that aimed at transforming government functions and reducing the size of staff and number of departments. To spur economic growth, the Chinese leadership has taken dramatic steps such as setting up 'special economic zones' (*jingji tequ*) and allowing alternative forms of ownership. It has allowed collective, private, and foreign direct investment (FDI) relevantly free from planning or control, to operate alongside and compete with SOEs.

Due to the reform, the centre and localities relationship has significantly changed over the past three decades and this has significant implications for competition and regulation in China.[56] So far, the reform has mainly involved the decentralization of economy and the key has been the reduction of Beijing's control on local fiscal system. In part because of this changing political equilibrium, local officials have gained a strong role in economic development through licensing and other regulatory powers. Reformist propaganda slogans have included 'to get rich is glorious' (*zhifu guangrong*) and 'some get rich first' (*rang yibufenren xian fuqiliai*). Officials were quick to recognize that their position and power may be turned to their advantages through legitimating rent-seeking activities. Such activities have been called as 'creating income' (*chuangshou*). As one could expect, transition in China is a conflict-ridden rather than a consensual process. The signals are clear that the ever-greater importance of the market mechanism in resource allocation and the increasing autonomy of enterprises require a new approach of governance. The market economy has its own ideological and moral basis, which the Chinese economy in transition, to certain extent, is still lacking.

2.4 The Legislature

2.4.1 The National People's Congress and its Standing Committee

[56] See 4.1.2 and 4.5.2, below.

Since its creation in 1954, the National People's Congress (NPC) has been the highest legislative body and organ of state power. The NPC has authorities to appoint and remove leaders and members of state organs at the central level, to decide national development plans and state budgets, and to supervise the implementation of the constitutional law, etc.[57] These powers seem extensive at first glance, but in practice it is not the NPC that really controls them. Important decisions and appointments are made by the Central Committee of the CCP and then passed on to the NPC for its 'consideration'. The NPC was previously called a 'rubber-stamp', which means it was only a useless decoration. As observed by western commentators, from its inception the NPC 'has lacked the organizational muscle to tell the executive and the judiciary what to do'.[58] Furthermore, the NPC has a large number of delegates (2,985 at the 2004, the beginning of the 10th NPC) and meets only once per year to really exercise its power. Therefore, it has been noted that the NPC is 'not really a parliament in the usual sense', and is difficult to 'initiate legislation on its own.'[59] The NPC elects a Standing Committee (SCNPC) to act on its behalf when not in session. The SCNPC is the permanent body of and sits for the same term as the NPC. Because of its smaller size (approximately 150 members) it can hold regular meetings every two months.

Since the late 1970s, the roles of the NPC in making laws, supervising law enforcement and the work of governmental organs, and making decisions about state affairs have all been strengthened to some extent. The number of laws and regulations enacted by the NPC and local people's congress (LPC) has increased steadily. It is not unusual for members of the LPC to reject candidates nominated by higher-level CCP committees for senior positions in local government. Even the number of negative votes on important matters has increased. For example, in 1997, over a thousand representatives (one-third of the total) voted against the annual work report of the

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[57] XIANFA (Constitution 1982) art 62.

[58] K O'Brien, *Reform without Liberalization: China's National People's Congress and the Politics of Institutional Change* (Cambridge University Press, New York 1990) 79.

[59] William C Jones, 'The Constitution of the People's Republic of China' (1985) 63 (4) *Washington University Law Quarterly* 708-709.

Supreme Procuratorate of the PRC to protest against unsatisfactory progress in the campaign against corruption.

2.4.2 The Legislative Procedure

According the Constitution 1982 and the Legislation Law 2000 (*Lifa Fa*), the legislative power of the PRC is primarily vested in the NPC and the SCNPC. The legislative procedure of basic laws involves four stages, namely, submission of bills, deliberation (reading), voting, and approval and publication. Legislative procedure for administrative regulations, ministerial rules and local regulations and rules are varied.[60]

Figure 2.2 the Legislative Structure of the PRC

National People's Congress (NPC): the supreme legislative organ

- Amending constitutional law
- Enacting and amending basic laws
- Meeting annually for two weeks to review and approve major policies, laws, the budget, and major personnel changes

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Standing Committee of the National People's Congress (SCNPC)

- Interpreting constitutional law
- Enacting, amending and interpreting basic laws
- Exercising state power when the NPC is not in session

↓

State Council (SC): the central government

- Submitting bills to the NPC and the SCNPC
- Enacting administrative regulations in accordance with the constitution and the basic laws

↓

Ministries, Commissions, and Administrations and Bureaus

- Enacting ministerial rules

↓

Local People's Congress (LPC) – provincial and autonomous regional level, and municipalities directly under the central government

[60] LIFAFA (Legislation Law 2000) arts 12-41.

- Enacting local regulations
↓
Local Government (LG) – provincial and autonomous regional level, municipalities directly under the central government and certain cities (e.g. provincial capitals and specially approved cities) - Enacting local rules

The concept of 'basic laws' is worth to be examined further. The Constitution 1982 and the Legislation Law 2000 do not clearly define the legislative competence of the NPC and the SCNPC. It is provided that the NPC has the power to enact 'basic laws', the SCNPC has the power to enact 'laws' other than those should be enacted by the NPC. Both 'basic laws' and 'laws' have not been clearly defined. According to the legislative practice over the years, certain laws are clearly regarded as basic laws, including the Criminal Law, the General Principles of Civil Law, the Criminal Procedural Law, the Civil Procedural Law, and a variety of organic laws for the legislature, the judiciary and the executive, etc. These laws have been enacted by the NPC. The status of some other laws, however, is less certain. For example, the Contract law was enacted by the NPC, whereas the Company Law was enacted by the SCNPC. The Inheritance Law was enacted by the NPC, whereas the Land Administration Law was enacted by the SCNPC. In order to avoid drawing an uncertain distinction, this writer chooses the concept 'basic laws' to cover both 'basic laws' and 'laws' falling within the legislative competence of the NPC and the SCNPC.

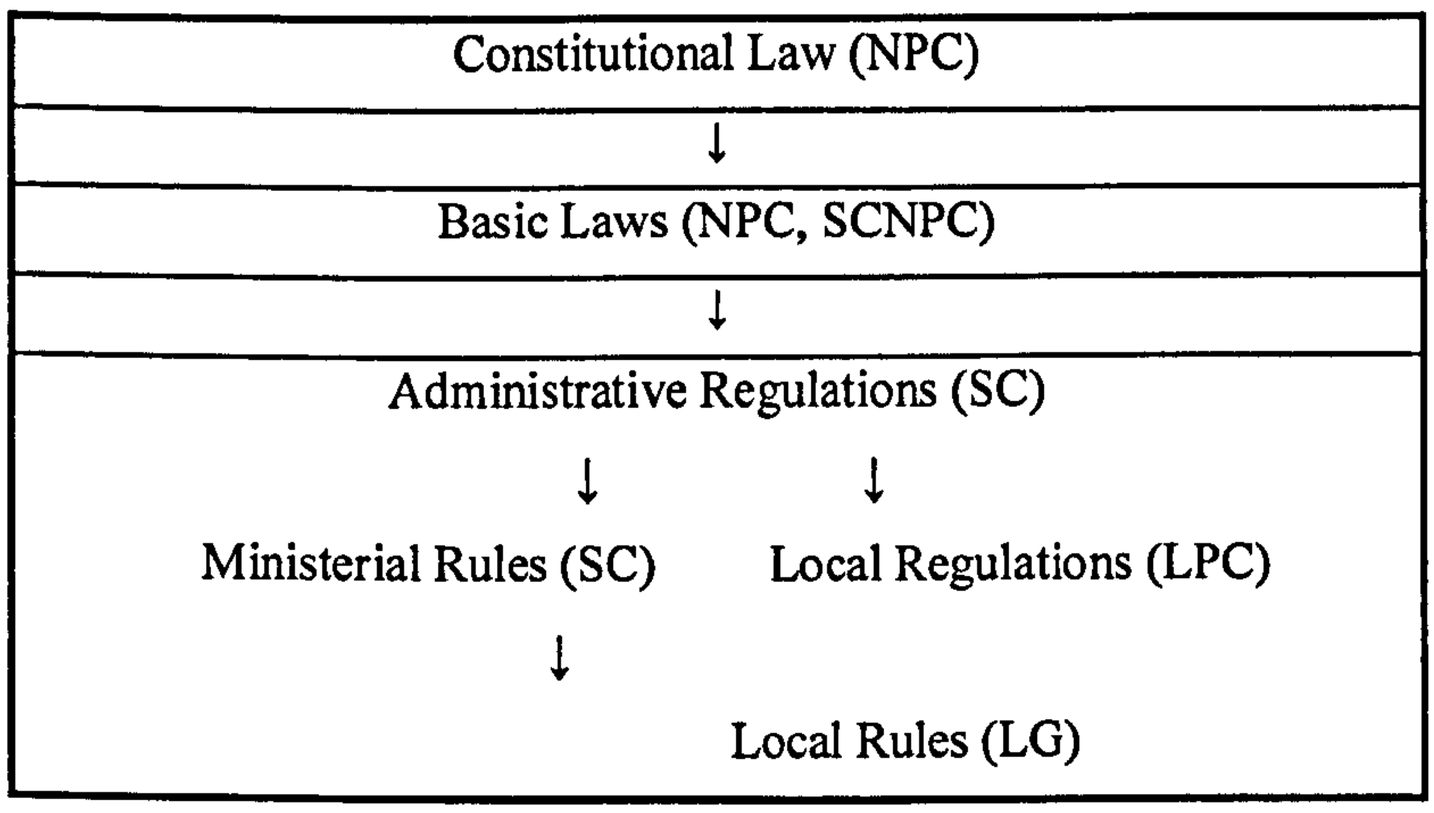
In fact, although the NPC has the highest legislative authority in the PRC, the SCNPC holds substantial legislative power because it holds meetings once every two months for a ten-day session but the full NPC convenes for only one short session each year. Therefore, although according to the Constitution, the NPC holds the exclusive power to amend the Constitution and to enact basic laws, most important laws of the PRC have been read and passed by the SCNPC. For example, the Company Law, the Securities Law, the Employment Contract Law, and the Insurance Law. The AML, regarded as the centre of the Chinese economic law system, had been on the legislative

agenda of the 8th, 9th, and 10th SCNPC and was finally enacted at the 29th Session of the 10th SCNPC.[61]

2.4.3 The Hierarchy of Chinese Law

The Constitution 1982 and the Legislation Law 2000 set out a hierarchy of legislative authorities and powers, which recognizes those central and local bodies with legislative competence.

Figure 2.3 Sources and Hierarchy of Chinese Law



It may be noted that the hierarchy between ministerial rules and local regulations is not clear.[62]

2.5 The Judiciary

A Chinese jurist once commented that, "[t]here was no tradition of individual rights enforceable against the State and the Party. Legal institutions remain less specialized and law enforcers less professional than those in the established democracies."[63] This comment reflected certain features of the Chinese judiciary and the section below

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[61] See 3.1.4, below.

[62] LIFAFA (Legislation Law 2000) arts 79, 80, and 82; see also, Kevin X Li and Ming Du, 'Does China Need Competition Law?' (2007) March Issue *Journal of Business Law* 190.

[63] Liang Zhiping, *Xunqiu Ziran Zhixu zhong de Hexie* (Seeking Harmony from the Natural Order) (China University of Politics and Law Press, Beijing 2002).

provides an overview of such system.

2.5.1 The People's Court System

The People's Court System is divided into four levels, from the top to the bottom, including, (1) the Supreme People's Court (SPC), (2) the higher people's courts at the provincial level, (3) the intermediate people's courts at the municipal level, and (4) the basic people's courts at the county or district level.

The judicial system of the PRC was paralysed during the Cultural Revolution. During the first two decades of reform, the CCP continued to exercise direct control over personnel appointments to the court system and over important decisions. Such practice compromised the objective of separating the party from the state and undermined the capacity of the judicial organs to carry out their functions independently. The CCP also followed a broad strategy in limiting judicial authority of retaining a framework of law while influencing the judges indirectly. The situation has changed slowly but steadily. The Chinese judicial system now plays an increasingly important role in law enforcement, has become more independent, and has been much more open to the public and the media.

However, such independence is a relative matter. Political interference in legal procedure still exists and, at the local level, occurs frequently. The more important an issue is to the government, the more likely it is there will be an intervention. As Peerenboom noted, 'in the past, many decisions were made prior to trial in accordance with the dictates of CCP personnel', and therefore, 'one of the peculiarities of litigation in the PRC is that cases are often decided outside the courtroom.'[64] In addition, local judicial systems are under a dual leadership system. On the one hand, they are subject to guidance from their professional superiors; on the other hand, however, they are also under supervision from the CCP committee and people's congress at their administrative level. It's noteworthy that China is a civil law country, and case law is

[64] Randall Peerenboom, 'Ruling the Country in Accordance with Law, Reflections on Rule and Role of Law in Contemporary China' (1999) 11(3) *Cultural Dynamics* 339.

not binding as precedent. It is possible that different people's courts may issue different opinions on the same or similar legal issues. In recent years, the influence of the vertical leadership has become stronger, and this has led to increase in judicial independence. Nonetheless, the horizontal leadership has caused a problem of the judiciary's dependence on the government for financial support. Furthermore, it is noteworthy that judges have no independent status in the PRC. They must contribute to building socialism and protecting the party's leadership. Throughout the country, a great number of judges were selected from veteran officers who normally lack any previous legal education and training. Although this mechanism for appointing the judges has declined recently, the effect is lingering.

The fact is law is seen to be an instrument in the service of 'socialism'. It is simply 'a generality of political expedience, a way to get things done most effectively. It may and will be violated whenever the considerations of administrative efficiency that led to its adoption point the other way.'[65] Therefore, Saich commented that the Chinese legal system is 'one specific cog in a bureaucratic machine that is built to achieve state objectives'.[66]

2.5.2 The Role of Law

From the slavery society to the present socialist system in transition, the Chinese legal systems have been developed, amended, transplanted, and localized in order to adapt to particular social and political order.

The traditional Chinese concept of law was very different from what is familiar to the most in the modern world. Manifested mainly as criminal rules, Chinese law until the 1890s was primarily a tool for dominance and its principal purpose was to deter the potential wrong-doing. Traditional Chinese Society recognized the different statuses of nobles, officials, commoners, and the 'mean' people. Relationships based on family

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[65] Roberto M Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (The Free Press, New York 1976) 67.

[66] *Saich* (n 9) 137.

and social classes have historically been at the core of the civil society, corresponding with the doctrine of the Confucianism, which considered that family and social status were the essential themes of ethical codes and the backbone of the social order. Valuing social harmony, the rulers strongly believed comprehensive legislation or extensive litigation was not required by a harmonious society. As a result, social norms based on Chinese morality governed the society. The law was not perceived to protect individual rights but was deemed as an instrument of the last resort.[67] The essence of traditional Chinese law remains influential after the establishment of the PRC in 1949 and Chinese legal developments, at present and in the future, are still shaped by its past to a significant extent.

In the early decades of the People's Republic, the legal system established by the Kuomintang was abolished and legal thoughts were dismissed as 'bourgeois rightist'. There were very few laws at all which reflected a national tradition of unchecked power and the judiciary was largely a branch of the police force. However, laws did become more precise and significant after the end of the Cultural Revolution in 1976. For example, in 1979, the PRC passed its first criminal law. The law's later revisions abolished the vague crime of 'counter-revolution' and established the right of defendants to seek counsel. At present, law is more important as a mechanism to maintain social order than it was at any time in the Chinese history. The emphasis of traditional culture on harmony and informal approaches of dispute resolution is increasingly at odds with the reality of a market economy and a more pluralistic society. Unger once commented, 'market rationality cannot be squared with a situation in which merchants are unable to predict how government power will be used to affect their transactions and their assets.'[68] The following is a review of Chinese leaders' perceptions of the role of law because those understandings have produced substantial impacts to legal developments of the PRC.

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[67] Ch'u T'ung-tsu (Qu Tongzu), *Law and Society in Traditional China* (Hyperion Press, Westport CT 1980); also see general discussion on traditional Chinese law in Kui Hua Wang, *Chinese Commercial Law* (Oxford University Press, South Melbourne 2000) 1-9.

[68] Unger (n 25) 73.

Mao Zedong, Deng Xiaoping, Jiang Zemin, and Hu Jintao are deemed as the cores of the first, second, third, and fourth generation of leaders to the CCP and the PRC. Mao Zedong defined law as an instrument of class struggle, which was to be implemented by political campaigns and mass movements rather than by formal judicial institutions. Mao continuously resisted a purely legal order in China by emphasizing communist ethics. In Mao's China, law was simply an instrument in the hand of the CCP and the bourgeois notion of 'rule of law' was rejected. Such a fact eventually led the country into two decades of legal nihilism from the Anti-rightist Movement, starting in 1957, to the end of the Cultural Revolution in 1976.

After resuming leadership in 1978, Deng Xiaoping chose a pragmatic approach towards law. Based on his painful political experiences during the Maoist era, he stated that 'very often, what leaders said is taken to be the law and anyone who disagreed was called a law-breaker. Such law changed whenever the leaders' views change'.[69] Deng believed law was necessary for socialist modernization and social governance. Deng led the country to a 'Chinese path' of searching for a socialist legal theory. Such a theory must adhere to the country's 'Four Fundamental Principles', namely, the socialist road, the people's democratic dictatorship, the leadership of the CCP, and Marxism-Leninism and Mao Zedong Thought.[70] Deng considered that 'the law was the highest authority', although even today the relationship between the law's authority and the CCP's leadership is still ambiguous. Deng later introduced five practical legal principles, including 'there must be laws for people to follow' (*youfa keyi*), 'laws must be observed' (*youfa biyi*), 'law enforcement must be strict' (*zhifa biyan*), 'law offenders must be punished accordingly' (*weifa bijiu*), and, 'all are equal before the law' (*falu mianqian renren pingdeng*). Under these action-driven principles, legal reform had started as part of Deng's mission to establish socialism with Chinese

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[69] Deng Xiaoping, 'Implement the Policy of Readjustment, Ensure Stability and Unity' (Speech) (25 December 1980) in *Selected Works of Deng Xiaoping 1975-1982* (Foreign Languages Press, Beijing 1984) 157-58. In this speech, Deng opposed the rule of men and advocated the rule of law.

[70] Deng Xiaoping, 'Guanyu Sixiang Jiben Yuance' (On the Four Fundamental Principles) (Speech) (30 March 1979) in *Deng Xiaoping Wenxuan* (Selected Works of Deng Xiaoping) vol 2 (The People's Press, Beijing 1994) 158-184.

characteristics. Especially after 1982, the CCP adopted a very favourable attitude towards law and regarded it as an effective means to implement China's reform agenda. It was Deng who brought the idea of a 'socialist market economy' into China[71]. An instrumentalist view still prevailing. However, the Chinese legal reform has advanced far beyond expectation of the narrow instrumentalists who deemed the socialist legal system as a safeguard and a justification to the rule of the CCP. As noted by a commentator, 'once Party rule was constrained to rule through law, de-politicization grew apace'.[72]

In 1997, Jiang Zemin brought the idea of 'rule the country by law' into China.[73] In 2001, at the National Conference of Heads of Propaganda Departments of the CCP, Jiang put forward another idea of 'governing the country by law and morality'. He emphasized that in the process of building socialism with Chinese characteristics and developing a socialist market economy, the CCP and the government should strengthen the socialist legal infrastructure, reinforce judicial independence, improve the quality of legal personnel, train lawyers and promote citizen's legal consciousness. At the same time, the socialist morality must also be strengthened and the government should integrate the law and the morality when governing the country. Since 1992, China has been busy with economic legislation and improving legal facilities for its socialist market economy.[74]

2.5.3 Chinese Constitutional Law

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[71] Deng Xiaoping, *Deng Xiaoping Wenxuan* (Selected Works of Deng Xiaoping) vol 3 (The People's Press, Beijing 1994) 149. Deng created the concept 'socialist market economy' and wrote the followings: 'There is no fundamental contradiction between socialism and a market economy. The problem is how to develop the productive forces more effectively. We used to have a planned economy, but our experience over the years has proved that having a totally planned economy hampers the development of the productive forces to a certain extent. If we combine a planned economy with a market economy, we shall be in a better position to liberate the productive forces and speed up economic growth.' Deng further stated that '[p]lanning and market forces are not the essential difference between socialism and capitalism. A planned economy is not the definition of socialism, because there is planning under capitalism; the market economy happens under socialism, too. Planning and market forces are both ways of controlling economic activity'.

[72] Carlos Wing-Hung Lo, 'Socialist Legal Theory in Deng Xiaoping's China' (1997) 11 (2) *Columbia Journal of Asian Law* 469, 480.

[73] Jiang Zemin, *Gaoju Deng Xiaoping Lilun de Weida Qizhi, Bao Jianshe You Zhouguo Tese de Shehuizhuyi Shiye Quanmian Tuixiang 21 Shiji - Report to the 15th National Congress of the CCP* (The People's Press, Beijing 1997).

[74] – *'Legal Service for Economic Order'*, August 1993 *Beijing Review* 9-15.

A constitution is described as a 'map of public power'.[75] China provides a contemporary example of the evolution of communist thinking about constitutions and law. Because the Marxist theory explicitly rejected the Western idea of constitutional rule with its emphasis on limited government, individual rights and private property, the CCP rejected the idea of a neutral constitution and therefore the concept of judicial independence. Yet as with many other aspects of Chinese politics, this situation has began to change since the 1980s as the party discovered the advantage of applying the rules consistently, through the rule of 'socialist law' and a measure of 'socialist legality'.

The PRC has been governed by four Constitutions since 1949.[76] In general the Constitution 1982 (the current constitution) reflects the country's ambitions to create a more predictable system based on a clearer separation of roles and functions of state organs as well as a system of relatively clearly defined citizens' rights and obligations. It also reflected the attempt to free the state organs from the control of the CCP. For example, compared with the Constitution 1975 and Constitution 1978, the power of the CCP has decreased although the leadership of the party is still affirmed in the preamble of the constitution through the 'Four Fundamental Principles'. In that sense, both the constitution and law remains 'a bird in a cage'[77] and the public's freedom for political manoeuvre remains circumscribed and limited. Not surprisingly, it was commented that 'China does have a set of institutions for the preservation of social order and governmental authority, but these institutions operate on very different principles from institutions usually called "legal"'.[78]

2.6 Concluding Remarks

China is in the process of transition from a central-planned economy to a market

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[75] I Harden, 'The Constitution and its Discontents' (1991) 21 *British Journal of Political Science* 489, 491.

[76] Enacted in 1954, 1972, 1978, and 1982 respectively.

[77] S B Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford University Press, Palo Alto, CA 1999).

[78] D C Clarke, 'Justice and the Legal System in China' in R Benewick and P Wingrove (eds), *China in the 1990s* (Macmillan, Basingstoke 1995) 92.

economy. The transition, by definition, aims at gradually establishing the market as the central mechanism of resource allocation. The market is not a panacea, nor is it an end in itself, but it is rather a means to promote social and individual well-being. The review of the PRC in transition indicates that some characteristics of the pre-transitional power and social structure still exist today. The accelerating economic reform, the paradoxical 'socialist market economy', the hesitant political transformation, and the fragile legal institutions have set a unique context for Chinese competition law and policy.

Ray Huang, a distinguished Chinese historian, once predicted as follows:

> The decades ahead may promise to be the most challenging and creative era for persons engaged in China's legal profession. New laws have to be enacted to keep pace with the new dimensions of materialistic life. These things could not be adequately done in the past, just as it would have made little sense to impose modern traffic regulations and street signs before the automobile was invented.[79]

For example, China's WTO membership seems to presume not only a liberal trading order, but also an independent legal system that constrains government as necessary, transparent, accountable and a relatively pluralistic political order. As regards competition and competition law, however, traditional Chinese culture is hostile to the operation of markets and rational competition among firms or profit-seeking behaviour may be contrary to the vested interests. No doubt in many cases, as indicated by the following chapters, the law and policy are used merely as a form of special pleading by interested parties. Nevertheless, competition law tends to be misused or is perceived to be misused elsewhere. For example, when discussing images of European competition law experience, Gerber write:

> Many believe that competition laws were created and have been maintained by bureaucrats seeking murky objectives in often suspect ways and that they

[79] *Huang* (n 5) 251.

have had little, if anything, to do with central issues of political and economic development.[80]

Accordingly, although active state engagement is indispensable for establishing competition law and policy in a transitional PRC, one might ask if the country is well-prepared for an optimum implementation of competition law and policy, which depends on checked and balanced administrative and judicial systems.[81] Another logical question followed is how China has learnt from the advanced competition regimes considering the gap between the reality in China and the theory and practice in the West. As one may see from the following chapters, to some degree, the evolution of competition law and policy in the PRC has been the outcome of a collision and fusion between indigenous conditions and foreign experience, which occurs in connection with changes in the Chinese society and governance.

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[80] *Gerber* (n1) 3.

[81] A typical pessimistic comment has come from Mark Williams as he argues that 'competition law can only be effective in a functioning democracy', and 'authoritarian or illiberal democracies are unlikely to have effective competition law systems.' See, M Williams, *Competition Policy and Law in China, Hong Kong, and Taiwan* (Cambridge University Press, Cambridge 2005) 423 and 431. Others, however, suggest that 'the question of how a competition law might be implemented may ... be separated from that of how, or whether, such a law should be formulated...', see Mark Furse, 'Competition Law Choice in China' 30(2) *World Competition* 323, 338.

3

The Developments of Chinese Competition Law and Policy

Chinese competition law was conceived in the 1980s, soon after the post-Mao state adopted an open-door policy. As the foundation of Chinese competition law, the Anti-unfair Competition Law (AUCL) (*Fan Buzhendang Jingzheng Fa*) was enacted in September 1993. Based primarily on the EC competition law model, the Anti-Monopoly Law (AML) (*Fanlongduan Fa*), as another principal pillar of Chinese competition law, had been formally on the legislative agenda since 1994 and was finally enacted on 30 August 2007. The past thirteen years had witnessed intense public debates on the necessity and suitability of the AML, with fighting between agencies to gain enforcement powers, warnings about the potential damage the law could have on business and foreign investment, and complaints on foreign control and on real or perceived restrictive and abusive behaviour by multinational corporations (MNC) in the Chinese market. The AML's enactment was therefore caused by a range of implicit and explicit social and legal-political factors.

This chapter provides a review of historical developments of the AUCL 1993 and the AML 2007. The chapter further identifies framework, objectives and key concepts of Chinese competition law and policy.

3.1 A Three-Decade Search: 1980 – 2007

> The most pressing task for China is to establish a legal system that interlinks the superstructure with the bottom layers of the society.
>
> Ray Huang[1]

So said a famous Chinese historian regarding the country's true challenge after

[1] Renyu Huang (Ray Huang), *Zhongguo Da Lishi* (China: a Macro History) (Sanlian Publish, Beijing 1997) 281.

traditional Chinese culture confronted the Western civilization in 1840 AD. The three-decade history of perceiving and transplanting competition law and policy has proved the difficulties involved when establishing such a legal system, especially certain key components that may shake the foundation of the society.

3.1.1 The Early Endeavour: the 1980s

China's first legislative effort to combat monopolies was the enactment of *The Interim Provisions for Promoting and Protecting Socialist Competition* (Guanyu Kaizhan he Baohu Shehuizhuyi Jingzheng de Zanxing Guiding), widely known as *the Ten Articles on Competition* (Jingzheng Shitiao), by the State Council in 1980.[2] This document aimed to introduce certain degree of 'healthy' competition into a planned economy. Nevertheless, one could easily recognise the conflicts between competition policy and socialist ideology. For example, although the regulation stated that necessary adaptations should be made to the pricing system in order to foster competition, at the same time, it stipulated that enterprises must apply for government approval to raise prices. The regulation also stated that prices of designated key products must remain stable. In addition, while it advocated technological development and commercial transfer, the regulation also urged enterprises to participate in technological exchange in line with 'the spirit of socialist cooperation'.[3]

The most noteworthy aspect was that certain types of local protectionism and sectoral monopolies were prohibited.[4] Commentators noted that it was the earliest attempt to deal with the so called 'administrative monopoly' in the PRC.[5] As a signal of the country's economic transition, the historic significance of this document is undeniable.[6] However, the regulation was just a paper tiger since it provided no

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[2] Issued by the SC on 17 October 1980, see *Official Gazette of the State Council*, no 487.

[3] Zheng Pengcheng, *Xingzheng Longduan de Falu Kongzhi Yanjiu* (Legal Control of Administrative Monopoly) (Peking University Press, Beijing 2002) 10-11.

[4] See 4.1.2, 4.2, 4.5.1, and 4.5.2, below, for discussion on notions of 'regional blockades (local protectionism)' and 'sectoral monopolies'.

[5] The Ten Articles on Competition, arts 3 and 6. See 4.2, below.

[6] From developing 'a planned commodity economy' in 1978 to 'a socialist market economy' in 1992, the PRC has

implementing mechanism, legal remedies or sanctions. Instead, it required involved regions and government departments to enact detailed measures accordingly. The regulation was soon forgotten without trace.

3.1.2 Legislative Battles: the Early 1990s and the Anti-Unfair Competition Law 1993

The Drafting Panel of Chinese Anti-Monopoly Law was set up as early as August 1987 under the Legislative Affairs Office of the State Council,[7] which produced a draft on anti-monopoly and a draft on unfair competition in 1988. Both drafts met with intense opposition. For example, one view was that although an anti-monopoly law may be necessary, there was no need to emphasis on administrative monopoly, as this may obstruct the process of top-down reform by the government, and put the government in an awkward position. As a result, only parts of the draft on unfair competition were enacted in 1993.[8]

The Anti-Unfair Competition Law 1993 (AUCL) is a foundation stone of the Chinese competition regime. Rather than waiting for a separate anti-monopoly law, the AUCL 1993 incorporates provisions that address certain forms of restrictive agreements, abuse of dominance, and administrative monopoly.[9] The AUCL 1993 avoids using the term 'anti-monopoly' but chooses the term 'unfair competitive behaviour' instead. Among the eleven categories of 'unfair competitive conduct', five are anti-competitive behaviour, including, forced transactions by public utilities or other statutory monopolists, administrative monopoly, below-cost sales, tying, and bid rigging. The remaining six categories are unfair trading practices, including passing-off, commercial bribery, misleading advertising, commercial secret infringement, illegal

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accepted the mechanism of market economy step by step without relinquishing the supremacy of socialist ideology. See ch 2, above.

[7] Wang Xiaoye, 'The Prospect of Antimonopoly Legislation in China', (2002) 1 *Washington University Global Studies Law Review* 201, 216.

[8] The AUCL was adopted at the 3rd Session of the 8th SCNPC on 2 September 1993 and entered into force on 1 December 1993. See, Kong Xiangjun, *Fanlunduanfa Yuanli* (Principles of Anti-Monopoly Law) (China Legal System Publishing, Beijing 1999) 48-49; Wang Xiaoye, *Jingzhengfa* (Competition Law) (Social Sciences Academic Press, Beijing 2007) 16.

[9] See 4.2.1, 5.2.1, 6.2.1, below.

prize sales and defamation.[10] No detailed guidance has been given on defining and assessing the above-mentioned unlawful behaviour. Taking below-cost sales for example, although the AUCL 1993 prohibits business operators from selling goods at 'a price that is below cost for the purpose of excluding competitors',[11] the AUCL 1993, the related subsidiary legislation and cases have offered no sufficient explanations on what cost level should be taken into account, how to assess the relationship between a firm's costs and prices, how to compute costs, and more difficultly, how to distinguish prices that are low for predatory purposes from prices which are low but as part of pro-competitive effects. Focusing on cost levels, predatory pricing theory of the EC and US competition law has been developed over the years through leading case laws and theoretic debates and has posed challenges to competition authorities in both jurisdictions.[12] Transplanting such a complex theory without thorough investigation into its rationale and cautious self-assessment on competence has rendered the rule on below-cost sales of the AUCL 1993 inoperative.

Figure 3.1 Unfair Competitive Conduct under the Anti-Unfair Competition Law 1993

Unfair Trading Practices (6 types) • Passing-off (Articles 5 and 21) • Commercial bribery (Articles 8 and 22) • Misleading advertising (Articles 9 and 24) • Commercial secret infringement (Articles 10 and 25) • Illegal prize sales (Article 13 and 26) • Defamation (Articles 14 and 20)
Anti-competitive Behaviour (5 types) • Forced transactions by public utilities (Articles 6 and 23) • Administrative monopoly (Articles 7 and 30) • Below-cost sales (predatory pricing) (Article 11)

[10] See Figure 3.1, below.

[11] AUCL 1993 art 11.

[12] See, for example, *AKZO Chemie BV v Commission* (Case C-62/86) [1991] ECR I-3359; P Areeda and D Turner, 'Predatory Pricing and Related Practices Under Section 2 of the Sherman Act', (1975) 88 *Harvard Law Review* 697; and, Economic Advisory Group for Competition Policy (EAGCP), *An Economic Approach to Article 82*, (Report) (July 2005) <http://europa.eu.int/comm/competition/publications/studies/eagcp_july_21_05.pdf> 50-53.

- Tying (Article 12)
- Bid rigging (Articles 15 and 27)

Regarding the enforcement mechanism, the AUCL 1993 authorizes the State Administration for Industry and Commerce (SAIC) and its local bureaux (AICs) above county level as enforcement authorities. However, the law further provides that 'where laws or administrative regulations provide that other departments shall exercise the supervision and inspection, those provisions shall apply.'[13] This in effect allows many other government departments exemptions from the AUCL application and a share of the enforcing power. In fact, many authorities have taken advantages of this opportunity. For example, the General Administration of Civil Aviation (CAAC), the Ministry of Information Industry (MII), the People's Bank of China (PBoC), the Ministry of Justice (MOJ) have adopted ministerial rules and taken over authorities to regulate anti-competitive activities fall within their remit.[14] Although according to the sources and hierarchy of Chinese law, ministerial rules are located at a lower level than basic laws and administrative regulations, these ministerial rules are often more active due to strong authorities and powers of the ministries and commissions involved. Such enforcement conflicts have severely compromised the effects of provisions on anti-competitive conduct under the AUCL 1993. Furthermore, the SAIC and the AICs, as primary enforcement agencies, have been proved to be vulnerable. The AICs at all levels are part of the government branch and lack sufficient independence and authority. Not only are they often challenged by conflict rules adopted by other authorities, but also their investigations are often interfered and enforcement blocked.

In addition, under the AUCL 1993, legal sanctions and remedies are insufficient. For example, although below-cost sales and tying are prohibited, no corresponding sanctions are provided, which further deprives the law's enforceability. Also, for a

[13] AUCL 1993 art 3.

[14] For example, (1) the Provisions to Prohibit Unfair Competition in Civil Aviation Transportation Market (27 February 1996), (2) the Telecommunications Regulations (25 September 2000), (3) the Provisions for Countering Unfair Competition Conduct by Lawyers (20 February 1995), and, (4) the Provisions on Prohibitions of Unfair Competition in Saving Service (14 February 1996).

public utilities enterprise or an operator in a monopoly position which forces users to purchase designated goods and services, the SAIC and AICs can impose a fine of RMB 50,000 – 200,000.[15] Such a range is normally a very small part of the profits made by those enterprises and thus can hardly stop them from violating the law. For administrative monopoly, the AUCL 1993 requires administrative agency at a higher level to 'make corrections'. Even 'the circumstances are serious', the higher agency only needs to impose internal 'administrative sanctions' on the officials directly responsible.[16] Neither the SAIC and the AICs nor the victims could challenge these decisions.[17] As Dr Kong Xiangjun, a justice of the Supreme People's Court (SPC), commented, 'there are no effective administrative measures under the AUCL 1993 to control restrictive competition activities, which, however, have to be mainly controlled by administrative measures.'[18]

Since the AUCL 1993 is limited in scope and its implementing mechanism has low authority, anti-monopoly provisions have been appearing continually in other legislative documents beyond the reach of the AUCL. An example is the Price Law (*Jiagefa*) passed in 1997, which prohibits 'unfair pricing activities' including collusion to control market price to impair the interests of other business operators or consumers, selling products below costs in order to eliminate competitors or monopolize the market, and offering the same products or service at a discriminative price.[19] Not only is there an obvious overlap between Price Law 1997 and the AUCL 1993 , the Price Law 1997 also grants enforcement power to 'price administrative agencies above county level', referring to the former State Bureau of Commodity Prices (SBCP), now the Price Department of the National Development and reform Commission (NDRC) and its local bureaux. No further clarification has been provided on responsibility

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[15] AUCL 1993 art 23.

[16] AUCL 1993 arts 7 and 30.

[17] See the *Yongchun* case at 4.4, below, for an example.

[18] *Kong* (n 8) 23.

[19] Price Law 1997 art 14 (1) (2) and (5).

allocation between the SAIC system and the NDRC system in asserting jurisdiction.[20]

From what have been discussed above, one may logically understand that, alongside the competition regime establishing process, China has enacted more and more laws and regulations, and as a result, the number of conflicting provisions has increased significantly over the years. To complicate the legislative chaos and enforcement conflicts, different authorities have issued provisions, interpretations and circulars, etc. at all levels with diverging effects. For instance, regarding the AUCL 1993, there are 11 judicial interpretations, 15 administrative regulations, 232 ministerial rules, 342 local regulations and local rules,[21] a fact which has caused and will continue to cause uncertainties in implementation, and further increase costs and difficulties in compliance. Under these circumstances the introduction of a systematic competition law and policy has objectively become a pressing task for Chinese legislators.

However, it is noteworthy that the PRC has chosen a two-pillar system of competition law, which primarily includes the AUCL 1993 and the AML 2007, and surrounded by related laws, regulations and rules. Such a legislative arrangement has both historic and epistemological reasons because the Chinese policymakers believe that the unfair competition law and anti-monopoly law regulate same objects, namely, the competition process and competition activities.[22] The AUCL 1993 is currently under revision for the purposes of separating the provisions on anti-competitive conduct from those on unfair trading practices. The AML 2007 is newly adopted, and other competition-related laws and regulations are expected to be revised according to the AML 2007 in the near future. A dynamic perspective is thus needed when assessing the

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[20] The Former State Bureau of Commodity Price (SBCP) was incorporated in the NDRC in 2003.

[21] Data source: Beida Fabao Chinese Law & Regulation Date Retrieval System <http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=chl&gid=6359> last accessed 9 October 2007.

[22] See 3.2, below. Also see, Shang Ming, 'Fazhanzhongde Zhongguo Jingzhengzhengce yu Lifa' (Progressive Competition Policy and Legislation in China) (Speech at the China-EC Forum on Competition Policy) (27 April 2005) <http://tfs.mofcom.gov.cn/aarticle/dzgg/f/200504/20050400081489.html>; and, Wang Xiaoye, 'Recent Development in Chinese Antitrust Law' (Speech at the ABA) (5 October 2004) <http://www.abanet.org/antitrust/at-committees/at-ic/pdf/programs/speech_to_aba_on_oct.5-1.pdf> 1-2.

Chinese competition law and policy. Furthermore, this author's opinion is that the future of Chinese competition law and policy, to a great extent, predictably depends on cautious institutional arrangement of the AUCL 1993 and the AML 2007.[23]

3.1.3 Acceleration v Postponement: from the Middle 1990s

Although the AML was proposed by the State Council (SC) as early as 1987, the formal drafting process was delayed until 1994. In this year, the Standing Committee of the 8th National People's Congress (the 8th SCNPC) proposed an anti-monopoly law in its legislative plan and authorized the State Economy & Trade Commission (SETC) and State Administration of Industry & Commerce (SAIC) to be responsible for drafting the proposed AML.[24] Five years later, the first complete draft, the 1999 Draft was submitted to the State Council (SC). As the constitution for free enterprises, the proposed AML envisaged a framework for business activities by protecting competition in the marketplace. However, because of many identifiable and unrecognised factors, enactment was postponed several times while the proposed AML had been on the legislative agenda of the 9th and the 10th SCNPC successively.[25]

Many commentators have argued that the real difficulties were resulted from the *status quo* of economic development and the PRC still lacks mature market conditions to implement a comprehensive competition law. Some opponents of the AML believe that monopolies can only arise in advanced markets where intense competition renders it possible for large-scaled companies to become monopolies or oligopolies. Since China is still in the process of establishing a market economy, they argue, the legislative effort would be an anachronism.[26] Concerns also exist among hesitant Chinese

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[23] See ch 8, below.

[24] See *Legislative Plan of the 8th NPC*, Central Committee of the CCP, (Zhong Fa 1994 no 2); Hu Shuli, 'Fanlongduan yeshi xingbailizhe ban jiushi' (Long way to go for the anti-monopoly mission) (2002) 20 March *Caijing Magazine* <http://www.caijing.com.cn/newcn/home/editorial/2005-05-08/2554.shtml>; Mark Williams, *Competition Policy and Law in China, Hong Kong, and Taiwan* (Cambridge University Press, Cambridge 2005) 172-177.

[25] See chs 2 and 9, respectively.

[26] Zhou Qiren, 'Jingzheng, Longduan he Guanzhi: Fanlongduan Zhengce de Beijing Baogao' (Competition, Monopoly and Regulation: Background Report on Anti-monopoly Policy) (Internal Research Report, The Department of Industry of The State Office of Restructuring, PRC) (22 December 2001); and, Xue Zhaofeng,

legislators who believe that the law might be severely undermined by complex competitive analysis and weak enforcement clouded by widespread abuse of administrative power to restrict competition. These challenges have prompted some Chinese innovations in the proposed AML's successive drafts, which have caused the proposed AML among the most hotly-debated topics in the PRC.

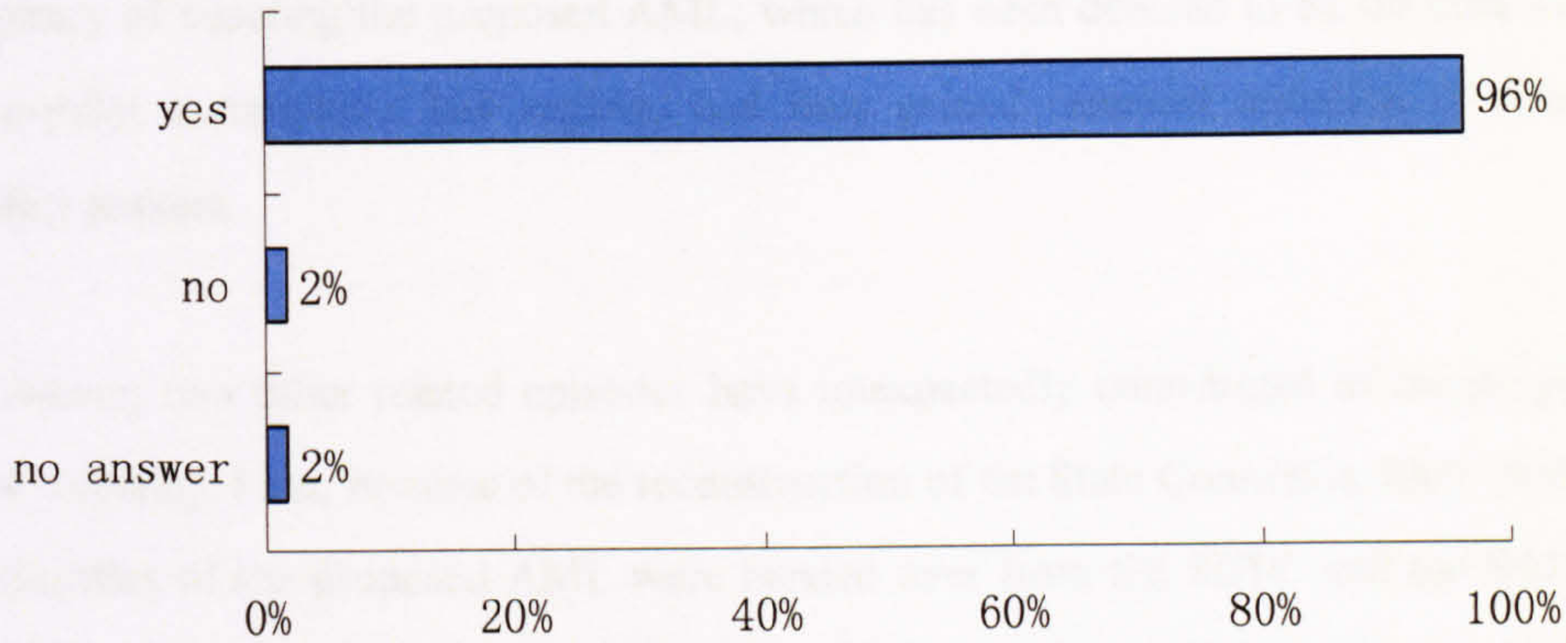
During the past ten years, however, monopoly related problems have aroused public uproar for market management and competition protection. Accompanying economic development, issues of market privatization and governance have become severe concerns of policymakers who deem these matters as particularly urgent challenges to the chaotic Chinese market. The issues are also perceived as potential risks to China's further successful transition. For example, widely known as 'administrative monopoly', abuse of administrative power to restrict competition refers to improper governmental intervention into the market and manifests as sectoral monopolies (initiated or caused by sector regulators) and local protectionism or regional blockades (initiated or caused by local government), remaining a divisive problem as an aftermath of the centrally planned economic system.

Figure 3.2 an Example -- Consumers' feedback on Regulated Industries in the PRC: Ridiculous Mobile Phone Bills[27]

Total Respondents: 279

'Buyao Xue Meiguo de Fanlongduanfa' (Do not follow the US Antitrust Law) *Nanfang Zhoumo* (Southern China Weekend) (Shenzhen 12 May 2000).

[27] See Appendix 2 for data explanation.



According to a survey conducted in the summer of 2005 by this writer[28], although the situation has been slowly improved over the years, 96% of respondents agreed that they had been charged two-way by their mobile phone service suppliers, which meant they have to pay for both making and answering calls when using their handsets. With 43% of respondents further expressed their strong dissatisfaction regarding the status quo of Chinese telecommunications market and other regulated industries, which is mainly monopolised by sectoral regulators and regulated enterprises.

In addition, private monopoly and industry concentration of 'national champions' have emerged which threaten to compromise China's efforts to achieve a competitive market economy. Furthermore, some multinational corporations (MNC) have been observed to abuse their dominant positions to harm consumers and distort the already vulnerable competition landscape.[29] Therefore, despite the economic boom, concerns both within and outside the PRC have been accumulating over these competition threats that may jeopardize the country's further transition to a modern market economy. Thus, protecting competition by improving legal and regulatory framework

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[28] The survey and series of interviews were conducted in May and June 2005 in the PRC as part of a field research which is funded by Central Research Fund, University of London (Ref: AR/CRF/C). This writer is honoured and grateful for the funding, without which the project would be unfeasible.

[29] SAIC, 'Zaihua Kuanguo Gongsi Xianzhi Jingzheng Xingwei Biaoxian ji Duiche' (Report on the Restrictive Competition Behaviors of Multinational Enterprises in China and Counter Measures) (2004) May Issue *Gongshang Xingzheng Guanli* (Journal of the State Administration of Industry and Commerce); He Wenlong, 'Fan Waizi Longduan de Zhengfu Linglei Zhengce Jianxi' (Reviewing Special Policies on Preventing Foreign Monopolizing) (2004) 4 *Zhengfa Xuekan* (Journal of Politics and Law) 16-19.

has become one of the key missions of Chinese government. The importance and urgency of enacting the proposed AML, which has been deemed to be the core of the two-pillar competition law regime, had thus gained renewed attention of China's policy makers.

However, two other related episodes have unexpectedly contributed to the proposed law's destiny. First, because of the reconstruction of the State Council in 2003, drafting authorities of the proposed AML were handed over from the SETC and the SAIC to the Ministry of Commerce (MOFCOM) and the National Development and Reform Commission (NDRC).[30] Secondly, many observers believed that the SAIC and the NDRC, as the premier enforcement agencies of the AUCL 1993 and the Price Law 1997, have nevertheless competed with the MOFCOM for the status of the Chinese anti-monopoly law enforcement authority. Eventually, a situation of fighting for drafting and future enforcement authority arose among the MOFCOM, the SAIC, and the NDRC.[31]

From the time it was conceived, the AML has attracted a great deal of attention within and outside China. Several events have already produced great impacts. For instance, sponsored by the China Academy of Social Sciences, Japan Competition Research Institute, and Washington University in St. Louis, etc., the Beijing Conference of Competition Policy and Economic Development was held in September 2002. The conference was co-chaired by professors Hiroshi Iyori and Wang Xiaoye, a leading competition law scholar and an adviser to the Chinese Anti-Monopoly Law Legislative Panel. More than seventy competition officials and experts from nine countries were presented.[32] Focusing on Chinese AML legislation, the globalisation of competition

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[30] The Ministry of Commerce is formerly known as the Ministry of Foreign Trade and Economic Cooperation (MOFTEC).

[31] See, for example, 'Pinglun: Lifa Fubai yi Chengwei Zhongguo Shehuixing de Qianwenti' (Comments: Legislative Corruption is becoming a potential problem for China) <http://comment.hexun.com/article.aspx?id=1077776>.

[32] The Conference representatives included, among others, Professor Hoseung Kwon, who was appointed as the 13th Chairman of Korea Fair Trade Commission in March 2006; Professor David Gerber, author of *Law and Competition in Twentieth Century Europe*, (The book was translated and published in Chinese which has guided many Chinese scholars' investigations into EC competition law.); Dr. Ulf Boege, President of German Federal Cartel Office, etc. Other representatives came from Thailand, Indonesia, Venezuela and other countries and regions.

law and WTO competition policy, working papers of the conference were published in Chinese that offered insights and a benchmark for the developments of the proposed AML.[33]

For example, in his article *Constructing Competition Law in China: The Potential Value of European and U. S. Experience*, Gerber writes that 'China will develop its own competition law on its own terms and on the basis of its own institutions, traditions, and goals', and '[i]t is unlikely to accept any foreign model of competition law as its own'. Although admitted the advantages of legal transplant, Gerber warns that 'effective borrowing of language and institutions is difficult, because it extracts them from the context in which they have been used', and emphasises the importance to 'recontextualize' the borrowed legal tools 'by examining how and why they were created, how they have developed, what their relationship is to other elements of the system, and what consequences they have produced'.[34] In another article, De Leon explores how institutions in developing countries shape competition policy-making and regulatory reform, the implications of this process on the adoption of a pro-market strategy, and the implications of its application to a transitional China.[35]

2005 was an eventful year in the legislative history of the AML because three drafts were submitted successively in April, July, and November and several far-reaching conferences regarding the proposed AML were held in China. In May 2005, the State Council held an 'International Symposium on China's Anti-Monopoly Legislation' and invited around twenty experts worldwide to comment and advise on the April 2005 Draft.[36] Other events included 2004 Shanghai Conference on Fair Competition and

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[33] Wang Xiaoye and Hiroshi Iyori (eds), *Competition Law and Economic Development* (Social Sciences Documentation Publishing House, Beijing 2003).

[34] Nie Xiaohong (trs), 'David Gerber: Cong Oumei Jingyan Kan Zhongguo Jingzhengfa de Zhiding' (Constructing Competition Law in China: the Potential Value of European and US Experience), in *Wang and Hiroshi* (n. 33) pp 205-213.

[35] Zhu Zhongliang (tra), 'Fazhanzhong Guojia he Zhuangui Guojia Jingzheng Zhengce de Zhidu Fenxi' (Ignacio De Leon: Institutional Analysis of Competition Policy in Transition and Developing Countries: The Lessons from Latin America), in *Wang and Hiroshi* (n. 33) pp 101-116.

[36] Department of Treaty and Law of MOFCOM, 'Guowuyuan Fazhiban Zhang Qiong Fuzhuren zai Fanlongduan Lifa Guoji Yantaohui Bimushi shang de Jianghua' (Speech by Zhang Qiong, Vice Director, the Legislative Affairs

Market Economy, 2005 Shanghai Conference on Market Entry and Fair Competition, and 2005 Beijing International Forum on Competition Policy and Legislation, etc.

Outside China, the American Bar Association has delivered two joint comments based on the 2002 Draft and the April 2005 Draft AML respectively.[37] The two ABA joint comments provided detailed analyses on most significant points of the proposed AML.

However, the lack of transparency of the AML legislative process caused concerns. According to the survey conducted by this writer during the summer of 2005, among 279 questionnaire respondents, 35% of respondents agreed that they knew China was having anti-monopoly legislation and were quite informed about the proposed law because of professional and/or other reasons. 45% of respondents agreed that they knew there was ongoing legislation on anti-monopoly. With 20% of people agreed that they had never heard about the proposed law. Please see Figure 3.3 below, which further indicates the public's familiarity to the substantive contents of the proposed AML and of the AUCL.

Figure 3.3 How familiar was the two-pillar system of competition law to the public in 2005?[38] [Total respondents: 279]

	Very familiar	Familiar	Unfamiliar	No answer
Familiarity with the contents of the proposed Anti-Monopoly Law (AML)	10%	25%	64%	1%
Familiarity with the contents of the 1993 Anti-Unfair Competition Law (AUCL)	32%	29%	39%	0

Office of the State Council to the Closing Ceremony of The International Symposium on China's Anti-Monopoly Legislation) (9 October 2005) <http://tfs.mofcom.gov.cn/aarticle/dzgg/f/200510/20051000525406.html>.

[37] American Bar Association (ABA), 'Joint Comments on Proposed Anti-Monopoly Law of the People's Republic of China' (July 2003 and May 2005) <http://www.abanet.org/antitrust/comments/2003/jointsubmission.pdf> and <http://www.abanet.org/antitrust/comments/2005/05-05/commentsprc2005woapp.pdf>.

[38] See Appendix 2 for data explanation.

For legal order to be established in China, an imperative step is the public's active participation in the legislative process and their awareness of the existing laws. In the present context, if one of necessary components to a successful competition law is compliance, the law needs to be made transparent and understandable. However, as showed by figure 3.2, in 2005, eleven years after the AML was proposed by the 8th SCNPC and twelve years after the promulgation of the AUCL 1993, only 35% of respondents were familiar with the contents of the proposed AML, among which 83% were law scholars and law students. In 2005, it was extremely difficult for the public to access the drafts of the proposed AML. The survey outcome revealed the AML legislative process was not sufficiently transparent and the proposed AML was far from being vigorously advocated among the general public.

However, although there were concerns and criticism on the inaccessibility and transparency of the legislative process to the general public,[39] according to Professor Wang Xiaoye, the legislative process of the proposed AML was relatively the most democratic and transparent one the PRC had ever had, taking into account the socialist State's strict confidentiality in previous legislative affairs. Professors Wang has actively promoted competition law to government officials and the public by delivering lectures and speeches and by offering advice. One of the latest lectures was delivered to the Standing Committee of the National People's Congress (SCNPC) in Beijing on 27th October 2005, under the title 'anti-monopoly law: a principal law to protect the socialist market economy order'. Mr Wu Bangguo, China's top legislator and Chairman of the SCNPC, chaired the lecture and other thirteen members of the SCNPC were presented.[40]

Professor Wang commented that the enactment of the AML will be a milestone in the Chinese legal history and the law's enforcement and evolution would act as a catalyst

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[39] See, for example, *Williams* (n 24) 172 and fns 44 and 45 of 172; Duan Hongqing, 'Boyi Lifa Gongkai' (Legislative process should open to the public) (2005) 138 *Caijing Zazhi* (Caijing Magazine).

[40] 'Renda changweihui juxing di shiqici fazhi jiangzuo' (the 17th Legal Lecture held at the SCNPC) *Renmin Ribao* (People Daily) (Beijing 28 October 2005) 1 <http://www.people.com.cn/GB/paper464/16033/1417260.html> last accessed 9 October 2007.

for the country's future political reform. She also commented that although problems which may cause uncertainty and inconsistency still exist, it would be naive to wait until the law reaches its perfection. Chinese decision-makers would like to see the law is adopted with great caution, and is tested and improved by practice.[41]

During the Annual Plenary Session of the 10th NPC in March 2006, the proposed law once again caused strong repercussion from the topic of administrative monopoly to concerns of M&A involving MNC, and from officials, the public, to the business community within and outside China. In spite of being at the centre of attention, both optimistic predictions of promulgation during 2006 or 2007 and gloomy views of the proposed law's uncertain fate in a 'never-never land' were prevalent.[42]

By August 2007, at least ten drafts (listed at Figure 3.4 below) were generated and unpublicly circulated among representatives of the NPC, the administrative and judicial systems, legal and business professionals, academia, and international experts and organisations for comments and discussion.

Figure 3.4 Ten Drafts of the Proposed Anti-Monopoly Law

- The 1999 Draft
- the 2001 Draft
- the 2002 Draft
- the 2004 Draft
- the April 2005 Draft
- the July 2005 Draft
- the November 2005 Draft

[41] Interviews with Wang Xiaoye, Professor of Law, Law Institute of Chinese Academy of Social Science (CASS) and Advisor to the Chinese Anti-Monopoly Law Legislative Panel; also see, Wang Xiaoling 'Fanlongduanfa: ba lifa nanti liudao zhifa zhong jiejue' (Anti-Monopoly Law: leave the legislative problems to implementation) <http://news.xinhuanet.com/newmedia/2005-09/05/content_3443874.htm>, last accessed 9 October 2007.

[42] Li Yuezheng, 'Fanlongduanfa shaguoli gai dun sha cai: duofang liyi boyi' (What should be in the pot of the anti-monopoly law: a multi-layers rivalry among multi-parties) *Zhongguo Qingnianbao* (China Youth Daily) (Beijing 27 January 2006); Cai Songting, 'Waizi longduanxing binggou xiang jinghao, Zhongguo yinjin waizi zhengce zhuanxiang' (alarms from monopolizing M&A: will China's foreign direct investment policy change direction?) (Zhongguo Xinwen Wang (Chinenews.com)) (27 March 2006).

- the First Reading Draft (June 2006)
- the Second Reading Draft (June 2007)
- the Third Reading Draft (August 2007)

3.1.4 The First and the Second Readings of the Proposed Anti-Monopoly Law

The proposed AML was submitted to the 22nd Session of the 10th SCNPC for a first reading in June 2006. In June 2007, the 28th Session of the 10th SCNPC considered the proposed AML for the second time. A consensus established between legislators, officials, and legal experts that the AML legislation should not be delayed any longer and the proposed AML should be enacted as soon as possible.[43]

The First Reading Draft includes 56 Articles under eight chapters.[44] The Second Reading Draft includes 57 Articles under eight chapters. Three types of monopolistic conduct fall under scrutiny, namely, monopoly agreements (restrictive agreements), abuses of market dominant positions and concentrations between undertakings that may have the effect of eliminating or restricting competition. The proposed AML also prohibits the abuse of administrative power to eliminate or restrict competition, a type of conduct that has caused the most formidable monopolies in contemporary China. Compared with the First Reading Draft, six major changes can be observed from the Second Reading Draft, including, (1) requiring the State to promulgate and implement competition rules appropriate for the socialist market economy and to improve macro-economic measures for a united, open, competitive, and orderly market system; (2) declaring that the State shall encourage concentrations between undertakings through fair competition and voluntary association in order to expand economic scale and scope and to increase competitiveness; (3) confirming that undertakings with dominant market positions shall not abuse such positions to eliminate or restrict competition; (4)

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[43] Official records of the proposed AML three readings are available at <http://www.npc.gov.cn/zgrdw/flzt/index.jsp?lmid=15&dm=1520&pdmc=ch>, last accessed 9 October 2007.

[44] Several articles have provided detailed analysis on the First Reading Draft. See, for example, Moritz Lorenz, 'Guarding the Pass – The Forthcoming Chinese Competition Legislation' (2007) 30 (1) *Word Competition* 137; Mark Furse, 'Competition Law Choice in China' (2007) 30 (2) *World Competition* 323; Maher Dabbah, 'The Development of Sound Competition Law and Policy in China: An (Im)possible Dream?' (2007) 30 (2) *World Competition* 341.

requiring the State to protect state-owned enterprises (SOEs) in key and strategic sectors and to protect legally arranged exclusive dealing. Meanwhile, pricing and business operations of such undertakings and arrangements will be scrutinized and regulated according to law; (5) requiring that trade associations shall improve self-discipline in order to guide legal competition between undertakings and to protect the market competitive order; and, (6) stating that mergers and acquisitions of domestic undertakings by foreign companies should be examined according to relevant laws and regulations if the proposed transactions are related to national security.

However, the Second Reading Draft includes no specific merger notification thresholds, leaving the task of clarification to the SC by promulgating AML implementing regulations before 1 August 2008. It is noteworthy that the First Reading Draft chose objective turnover notification thresholds in place of previously proposed multiple thresholds that combined criteria of turnover, transaction value and market shares. Under the First Reading Draft, the thresholds were met where the combined aggregate worldwide turnover of all the undertakings concerned exceeded RMB 12 billion and the aggregate turnover in the Chinese domestic market of any one undertaking concerned exceeded RMB 800 million.

During the AML's second reading, many top legislators appraised the Second Reading Draft as being 'more suitable to national conditions (*guoqing*)'. In contrast, leading Chinese competition law scholars commented that the latest developments indicated conflicting industry policy and competition law, growing protectionism and nationalism, and an ongoing battle to establish and defend national champions. Encouragingly, the Second Reading Draft converges to the international best practice and clarifies that the AML will not prohibit dominant market position *per se* but will scrutinize abusive conduct of market winners. Hopefully, this will further enhance the development of economically sound competition law in China. This writer suggests that a patient and dynamic approach is needed when observing the interface between competition law and industry policy and the rivalry between reformists, protectionists and techno-nationalists under the Chinese context.

3.1.5 The Third Reading and the Enactment of the Anti-Monopoly Law 2007

From 24 to 29 August 2007, the 29th Session of the 10th SCNPC was held in Beijing, which read the proposed AML for the third time. The Third Reading Draft made several revisions based on the Second Reading Draft, including superior powers granted to the AMEA to enforce the AML (against sectoral regulators), decreased powers to the AMC, clearer indication of a rebuttable market share presumption for establishing a dominant position, increased fines for restrictive agreements and abuse of dominance, and more serious punishment for abuse of administrative power to restrict competition, etc. The final version of the AML was almost identical with the Third Reading Draft, apart from a minor revision of an article on industry associations. Winning 150 out of the 153 votes, the AML was formally adopted on 30 August 2007 and will enter into force on 1 August 2008.[45] The AML's enactment is a landmark step in the establishment of a Chinese competition law system.

3.2 The Framework: Monism v Dualism

Chinese competition law and policy have two pillars, including the Anti-Unfair Competition Law 1993 (AUCL) and the Anti-Monopoly Law 2007 (AML). The system also includes a series of basic laws and numerous administrative regulations and ministerial rules.[46] In stead of a dual legislative framework of competition law composed of unfair competition law and anti-monopoly law, some Chinese scholars have advocated a unified legislative structure that combines the two pillars and has a centralized enforcement authority. Some believe that a dual legislative model implies significant conflicts in administrative institutions and may potentially caused inconsistency and uncertainty in implementation. In contrast, a unified competition law framework can integrate the AUCL with the AML, and establish a quasi-independent enforcement authority directly under the State Council. Such an arrangement, like those operating in Taiwan, Russia, Indonesia, and Hungary, etc. would be more

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[45] Xinhua News Agency, 'China adopts Anti-Monopoly Law,' (Beijing 30 August 2007) <http://www.chinadaily.com.cn/china/2007-08/30/content_6069209.htm>, last accessed 9 October 2007.

[46] See discussions in 4.2, 5.2, 6.2, 7.2, and 8.2, below.

accountable and transparent and less unpredictable, more efficient and less cost. It would also prevent the potential conflicts both in interpretation and in enforcement, and would further reduce rent-seeking behaviour.[47] However, until now, there is no sign that such a proposal would be accepted by Chinese legislators.

3.3 The Objectives

As observed by leading commentators, the topic of competition policy objective is an evergreen old one but with very new components.[48] 'The objectives of competition can shift'.[49] The variation in competition law objectives is seen both across time and across jurisdictions. They also vary depending on the stage of economic development and the size of the economy.[50] The issue of legislative objectives is relevant for recognizing the legislators' motivation to adopt a competition law and thus is imperative.[51] In addition, competition law and policy does not stand in detachment or live in a vacuum. Imbedded in a specific order, the law is functioning as an indication of contemporary values and goals of a society in particular, and is inclined to transform as political ideas in general. Different jurisdictions' competition law considers various concerns. Because views and insights shift over time and place, competition law therefore exists in tensions, conflicts, and inconsistency.[52]

Furthermore, the issue of competition law objectives is significant because the

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[47] Wang Yanlin, 'Zailun Zhongguo Jingzhengfa Lifali zhi Xuanze' (Revisit the Option of Legislative Model on the Competition Law of PRC) (2005) 1 *Jingzhengfa Pinglun* (Competition Law Review) 29-40; Wang Xuezheng, 'Jingzhengfa lifa moshi bijiao yanjiu' (Comparative Research into Competition Legislative Models) (1997) 5 *Zhongguo Faxue* (Chinese Legal Science) 59-66; Kou Xiangjun, *The Principles of Anti-Monopoly Law* (China Legal System Press, Beijing 2001) 29-51.

[48] CD Ehlermann & LL Laudati (eds), *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing, Oxford 1998); Dabbah, The *Internationalization of Antitrust Policy* (Cambridge University Press, Cambridge 2003) 49-57.

[49] *Sufrin* (n 106) 105.

[50] ABA, Report on *Antitrust* Policy Objectives, <http://www.abanet.org/antitrust/comments/2003/jointsubmission.pdf> (at appendices) fn 28 of p 12; World Bank and OECD, *A Framework for the Design and Implementation of Competition Law and Policy* (World Bank and OECD, Washington DC 1999) 1-7.

[51] *ABA* (n 47) 10.

[52] *Dabbah* (n 46) 51; Richard Whish, *Competition Law* (5th edn Butterworths, London 2003) 17.

approaches by which objectives are expressed affect the way in which they are conceived and understood.[53] Clear objectives inform the implementation of the law by helping to identify and explain differences in legal standards and outcomes in specific cases and such implementation makes the rationales explicit for decision-making and thus increases transparency and certainty.[54] Moreover, although economic theory and empirical techniques provide a set of tools with which to assess the relative merits of competing economic hypotheses, what hypotheses the decision-makers and practitioners should seek to test are implicitly related with the objectives of a particular system of competition law.[55]

3.3.1 The Classification of Competition Law Objectives: Lessons from Other Jurisdictions

A classification of competition law objectives across jurisdictions may help to further recognize that the AML has been molded to serve both economic and non-economic objectives, as well as direct and ultimate goals. It is a multi-purpose new endeavor, which has been adapted both to '*guoqing*' (national conditions) and to international accepted competition law principles.[56]

The US Sherman Act was enacted in 1890 to constrain the growth of industrial combinations and to protect the 'little man'. The statutory language was loose and vague and the interpretation was left to the judiciary.[57] With the passage of time, The US adopted more specific statutes to prevent dominant firms from foreclosing market opportunities to their less powerful competitors, to address unfair competition in order to benefit consumers, to protect small businesses from being disadvantaged by larger

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[53] David J Gerber, 'Constructing Competition Law in China: The Potential Value of European and U.S. Experience' (2004) 3 *Washington University Global Studies Law Review* 325-329.

[54] *ABA* (n 47) 1-2 and *Dabbah* (n 46) 49-57.

[55] S Bishop and M Walker, *Economics of E.C. Competition Law: Concepts, Application and Measurement* (2nd edn Sweet and Maxwell, London 2003) 3-6.

[56] Shang Ming (n22).

[57] *ABA* (n 47) 6-7; Jones and Sufrin, *EC Competition Law* (2nd edn Oxford University Press, Oxford 2004) 18-21.

competitors' buying power, and to forestall industrial concentration.[58] In Europe, the 1957 Treaty of Rome established the European Economic Community which was aimed to enhance peace in Europe by promoting free movement of goods, persons, services and capital within a common market. The Treaty of Rome included competition provisions addressing both restrictive agreements and abuse of dominance to promote market integration.[59]

Most recently, developing and transitional countries have had mixed motives in adopting competition laws.[60] For example, the purpose of the Armenia competition law is to 'protect and promote economic competition, to ensure an appropriate environment for fair competition, the development of businesses and protection of consumer rights.'[61] In the Russian Federation, the law is enacted in order to 'prevent, limit and suppress monopolistic activity and unfair competition, and ensure conditions for the creation and efficient operation of commodity markets'.[62] In Mongolia, the law's legislative intent is 'to regulate relations connected with prohibiting and restricting state control over competition of economic entities in the market, monopoly and other activities impeding fair competition.'[63] The legislative purpose of the Fair Trade Law of Taiwan is to maintain trading orders, to protect consumers' interests, to ensure fair competition, and to promote economic stability and prosperity.[64] The Indonesian competition legislature adopted in 1999, recites that it is intended to ensure economic democracy, equal opportunities for market actors, economic efficiency, and the welfare of the people.[65] As one could see, various objectives have been asserted by competition

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[58] Clayton Act 1914; Federal Trade Commission Act 1914 which was extended to address unfair or deceptive acts or practices in 1936; Robinson-Patman Act 1936; Celler-Kefauver Amendment to Clayton Act.

[59] *Jones and Sufrin* (n 54) 33-35.

[60] UNCTAD, *Model Law on Competition* (United Nations, New York and Geneva 2004) 13-15.

[61] Law of the Republic of Armenia on Protection of Economic Competition, art 1.

[62] Law of 30 May 1995 on Competition and the Limitation of Monopolistic Activity in Commodity Markets, Russian Federation, art 1.

[63] Law of Mongolia on Prohibiting Unfair Competition, art 1.

[64] Taiwanese Fair Trade Law 1992.

[65] Law of Indonesia No. 5 of 1999 Concerning the Ban on Monopolistic Practices and Unfair Business Competition.

laws of different jurisdictions since modern competition law was conceived in the USA and Europe. Many commentators have discussed this issue and have classified the objectives into different categories.[66] However, there is still no thorough and conclusive list available for counties that are currently adopting competition law.

Whereas there is no final consensus of which specific objectives are inappropriate, the general agreement is that the 'promotion of competition' expressed within efficiency terms is a fundamental objective. It is recommended that economic analysis, in terms of efficiencies, should play a central role in the application and enforcement of competition law. As recognized, the trend toward greater reliance on economic analysis provides a common language which furthers accountability and facilitates understanding and critical appraisal. Furthermore, such a trend provides recognized and objective criteria and modes of analysis, which can limit discretion of decision-makers and thus increase transparency. Increasing reliance on an economic analysis by different jurisdictions also helps to achieve greater convergence among competition enforcers, which may thus increase business certainty globally.

Instead of claiming that the sociopolitical objectives should be ignored, it has been further recommended that rather than functioning as operational criteria in individual competition cases, such objectives are best employed in the formulation of stand alone legislation or *a priori rule*. Furthermore, the examination of social and political objectives should be transparently separated from the economic analysis engendered by the promotion of economic objective.[67]

The following sub-sections provide an analysis of rationales and debates on economic and sociopolitical objectives, sole objective and multiple objectives, and ultimate and direct objectives of competition law and policy.

[66] See, for example, *Dabbah* (n 46) 49-53, *ABA* (n 47) 11-29, *World Bank and OECD* (n 47) 1-5.

[67] *ABA* (n 47) 1-2 and 37-41; *Ehlermann and Laudati* (n 46) 10-26.

3.3.1.1 Economic v Sociopolitical Objectives

The two categories that attract most debates can be defined as economic and sociopolitical objectives. Some commentators stated, regarding the two ends of the spectrum of the 'objective issue', there exist economic (efficiency and consumer welfare) and non-economic (sociopolitical and public interest) approaches to competition law.[68]

At one end of the spectrum is the view that the only goal of competition law is maximizing economic efficiency in order to achieve lower price, improved quality, increased choices, and accelerated innovation. There is no legitimate place for sociopolitical objectives such as fairness and equity because they are not able to be enforced in a consistent and transparent way as such criteria are ill-defined and subject to value judgements and political influences.

The contrary opinion is that competition policy is established on multiple values that reflect a society's wishes and such society's perception of itself. In fact, each country's competition law is modified to its needs, follows its historical and cultural framework and thus imbedded in its institutional arrangement. The law therefore unavoidably has both economic and non-economic objectives such as facilitating market integration, protecting small businesses, preserving the free enterprise system, maintaining fairness, honesty and social cohesion, upholding democratic process and pluralism, etc. However, unanimity breaks down within and across countries regarding how the respective weights and priorities should be attached to these objectives, and the potential tensions between some sociopolitical objectives intensify the argument. Nevertheless, some questioned whether there is a clear distinction between economic and sociopolitical objectives because most of the suggested sociopolitical objectives, such as democratic process, pluralism, market integration, etc., can also be described as economic goals.[69]

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[68] *World Bank and OECD* (n 47) 1; *ABA* (n 47) 1-3; *Dabbah* (n 46) 53.

[69] *Ehlermann and Laudati* (n 46) 6-8.

For example, the Japanese anti-monopoly law states that its ultimate objective is 'the democratic development of the national economy' which laid the foundation for thwarting the reoccurrence of 'Zaibatsu' (gigantic diversified family enterprises that once controlled the Japanese economy during the prewar ear, such as Mistsui and Yasuda). It obviously has a political component. However it was conceived as an economic objective. In addition, Japanese anti-monopoly law also specifies one of its objectives as 'fair competition', a concept generally understood by Japanese as competition by means of innate aspects of business, such as price and quality (but not hidden agendas and secret elements such as rent-seeking behaviour and *quid pro quos*). Therefore, 'fair competition' is another concept with both eminent economic and prudent political concerns.[70]

Therefore, it might be wise not to view economic and non-economic objectives as reciprocally incompatible. Political objectives have many economic elements and *vice versa*. However, the unfortunate situation exists that despite plausible economic arguments, people will suspect that the incentive for a decision is some other hidden reason.[71]

3.3.1.2 Sole Objective v Multiple Objectives

The endless drama of economic and non-economic objectives has also been expressed as a fight between sole objective and multiple objectives. Some commentators have claimed that the US antitrust laws have been serving economic efficiency, the exclusive or sole goal of competition law and policy during the past three to four decades.[72] Critics have argued that, by incorporating multiple objectives, the EC

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[70] *Ehlermann and Laudati* (n 46) 6-7; See also, Xu Shiying, 'Fanlongduanfa de Ribenhua jiqi Jiejian Yiyi' (The 'Japanese-Localization' of Anti-Monopoly Law and its Implications), and, Wang Weinong, 'Riben Jinzhilongduanfa de Jiben Fali: Mudi, Jiegou yu Jiben Gainian' (The Core Jurisprudential Dimensions of the Japanese Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade: Objectives, Structure and Basic Concepts) (2005) 1 *Jingzheng Fa Pinglun* (Competition Law Review) 190-192 and 140-149.

[71] *Ehlermann and Laudati* (n 46) 16.

[72] *Gerber* (n 50) 325, and, *Law and Competition in Twentieth Century Europe* (1st Paperback edn Oxford University Press, Oxford 2001) 520-521; *Bishop and Walker* (n 52) 3-6.

competition policy promotes integration and economic freedom but not competition; the regime also tends to prohibit normal business practice while providing exemptions to anti-competitive agreements.[73] Others declined this sole objective argument. They believed that the significance of efficiency does not necessarily indicate the omission of other objectives. Although they admitted that the relative weight and balance between economic and various other non-economic objectives that competition law can and might facilitate remain open to question, they claimed that every competition law has multiple objectives, more or less, explicit or implicit, and there is no exception. A leading competition law scholar once commented that, '[a] multiplicity of goals pursued by informed officials has been considered an essential feature of European competition law systems' and that '[o]ur story (of EC competition law) suggests that the tapestry of competition law experience has been far denser and richer than some who focus entirely on US experience might believe'.[74]

3.3.1.3 Ultimate v Direct Objectives

The direct (intermediate or operational) objectives of competition law basically addresses economic objectives, such as maintenance of effective competition, maximizing economic efficiency and consumer welfare by encouraging firms to behave competitively. They inform the authorities when and where to step in and what yardstick to use for decision-making. More specifically, direct objectives of competition law include the protection of price competition to facilitate the associated productive and allocative efficiency, and the protection of innovation competition to promote dynamic efficiency through the development of new products and processes.[75]

Ultimate objectives are those related to sociopolitical commitment such as preserving the democratic process, pluralism, free enterprise, fairness, and market integration, etc. Although sociopolitical objectives have economic consequences and vice versa, as

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[73] Rein Wesseling, *The Modernisation of EC Antitrust Law* (Hart Publishing, Oxford 2000) 80-85.

[74] *Gerber* (n 68) 420 and 433.

[75] *Ehlemann and Laudati* (n 46) ix & 33. In this report, the commentators agreed that the direct goals of competition policy should be 'limited to economic efficiency and consumer benefit'.

discussed above, some commentators suggest that one should not mix them up because, by so doing, competition law would be burdened with innumerable objectives for direct application, and the criteria for the assessment of individual cases would be unclear and less transparent. [76]

Furthermore, it is noteworthy that the direct objectives of competition law are much broader in developing and transitional countries than in developed countries. Competition law in developing countries often takes a more regulatory approach. The reason for such divergence is understandable: There are fewer consensuses among officials or politicians about the desirability of competition policy; also, the economic, legal, social or political frameworks are less developed for the proper functioning of a free market economy.[77]

It has been suggested that the direct objective of competition law of developed countries is to promote economic efficiency and to maximize consumer welfare. Therefore, the administration and enforcement of such competition law focuses on market behaviour and merger control. In contrast, the direct competition law objective in developing countries contributes more to the development of economic opportunities and entrepreneurship because in such countries, more efforts have to be made to set up the political acceptance of a market economy. One can thus predict the balance between economic and non-economic objectives in these countries is more fragile and vulnerable.

3.3.1.4 Potential Conflicts between Multiple Objectives

It is widely accepted that the application of economic analysis contributes a greater degree of precision and predictability in the enforcement of competition law. Therefore, economic philosophy of competition has become the law's dominant intellectual discourse and economic efficiency is a major objective of competition law and

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[76] *Ehlemann and Laudati* (n 46) 9.

[77] *Dabbah* (n 46) 52-53.

policy.[78] On the contrary, other sociopolitical objectives can complement, be neutral toward, or conflict with economic objectives. Attempts to take into account multiple objectives in the administration and implementation of competition law and policy may cause inconsistent outcomes because such an approach increases analytical complexity, reduces predictability and legal certainty, negatively affects the assessment of objectivity and fairness, and thus impacts the ability of competition law to achieve economic objective.

Furthermore, tensions between the objectives of equity and efficiency, and of protecting consumers and small business are often ignored.[79] For example, many jurisdictions use competition rules to protect small and medium-sized businesses. With the small business objective, however, competitors rather than competition may be protected.[80] In Japan, for instance, 'elimination of excessive concentration of power' and 'promotion of the democratic and wholesome development of the national economy' are fundamental competition law objectives. Japanese abuse of dominance provisions, together with the regulation of unfair trade rules, are often employed to approach such concerns. Nevertheless, the enforcement is 'often synonymous with a political struggle of the small against the large'.[81] A number of competition provisions of Germany, France, and Canada also provide protections for smaller undertakings.[82] In developing countries, a recent decision on substantive merits by the Indonesian Business Competition Supervisory Commission found Indomaret, a large, discount supermarket chain, responsible for 'not paying appropriate attention to the existence of the neighboring small shops' and for failing to 'observe the balance' between large-scale and small-scale retailers, and ordered Indomaret to cease its expansion in

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[78] Maher Dabbah, *EC and UK Competition Law* (Cambridge University Press, Cambridge 2004) 4.

[79] *ABA* (n 47) 15-16, 33-37; *World Bank and OECD* (n 47) 4-5.

[80] *Whish* (n 49) 17-21; *ABA* (n 47) 10, 18-21.

[81] Hiroko Yamane, 'Deregulation and Competition Law Enforcement in Japan: Administratively Guided Competition?' (2000) 23 (3) *World Competition* 141, 181-182; See also Act Concerning Prohibition of Private Monopolization and maintenance of Fair Trade (Act No. 54 of 14 April 1947) at s 1.

[82] For example, ss 20(3) (4) and 22(2) of the GWB; arts 420-2 of Code de Commerce and the New Economic Regulation (NER); Canadian Competition Act, R.S.C. 1985, C-34, Part I, 1.1.

traditional markets where it is directly facing small-scale retailers.[83]

In the PRC, Article 22 of the April 2005 Draft of the proposed AML once introduced the 'essential facilities doctrine'. The provision may raise significant concerns especially when applied together with 'refusal to deal' and interacts with Chinese IP law. The provision was vague and will potentially discourage investment and innovation from the stronger and thus protect the weak instead of retaining the process of competition. It has been advised that the provision should be either deleted or require evidence that the competitor seeking access cannot practically or reasonably duplicate the facility; the competitors seeking access should also demonstrate that access would further the legitimate interests of consumers.[84] The July 2005 Draft chose the first option and the provision was removed.

Some commentators have further observed that the issue of what objectives competition law should embrace in addition to economic efficiency, for instance, the protection of the less powerful, is ultimately a matter of political choice.[85] Using a law to protect the competition process causes tensions fundamental to any society, because, 'located at the confluence of economic and political power, these issues often act as a prism to reveal forces that otherwise might remain imperceptible.'[86] This observation may explain the underlying reason of the conflicts between multiple objectives of competition law and policy.

Furthermore, competition policy may be politically unpopular, as it disturbs vested interests and affects the distribution of wealth. A tradeoff may have to be made between the economic and non-economic objectives. However, competition policy has a sound efficiency justification but it is not a panacea. Other laws and policies, such as

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[83] PT Indomarco Prismatama, Decision No. 03/KPPU-L-1/2000, Decision of Business Competition Supervisory Commission of the Republic of Indonesia. Quoted in *ABA* (n 47) 20-21.

[84] *ABA* (n 35) (2005) 3-4 and 20-21.

[85] *Jones and Sufrin* (n 54) 18; *Whish* (n 49) 22; *Dabbah* (n 46) 59-60.

[86] *Gerber* (n 68) 1.

taxation and subsidies, address other aspects of the economic and political system and thus may provide more appropriate and directed solutions to competing interests.

3.3.2 Objectives of Chinese Competition Law

3.3.2.1 Objectives of the Anti-Unfair Competition Law 1993

The AUCL states that 'the law is enacted in order to safeguard the healthy development of the socialist market economy, encourage and protect fair competition, prohibit unfair competition act, and defend the legitimate rights and interests of operators and consumers'.[87] 'To defend the legitimate rights and interests of operators' reflects a fundamental difference between the AUCL and the AML, as the latter is expected to protect the competitive process, not competitors.[88]

3.3.2.2 Objectives of the Anti-Monopoly Law 2007

The wording of the AML objectives has evolved over the years. Similar to its predecessors, the 2002 Draft once stated its objectives as 'to stop monopolies, safeguard fair competition, protect the legitimate rights and interests of consumers and operators, and to promote the healthy development of the socialist market economy', which was almost identical with the legislative objectives of the AUCL. The conflicting objectives of 'protecting legitimate interests of consumers and operators' were recognised and the AML objectives have finally been narrowed down to 'preventing and prohibiting monopolist conduct, safeguarding fair market competition, improving economic efficiency, protecting the interests of consumers and public interests, and promoting the healthy development of the socialist market economy.'[89]

3.3.2.2.1 Economic Objectives

The manifest economic objectives of the AML are prohibiting monopolistic conducts,

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[87] AUCL 1993 art 1.

[88] *Gerber* (n 68) 37-38.

[89] AML art 1.

preserving the process of competition, and protecting consumers' interests.[90]

The first progress is the transformation of 'prohibiting monopoly' (adopted by the 1999 and 2002 Drafts) to 'prohibiting monopolistic activities' (adopted since 2004). This change reflected the Chinese legislators' recognition that monopoly could be a prize from competition by merits, such as innovation, low price, or dedicated service. By focusing on 'monopolistic activities', the AML could enable the authorities to distinguish between desirable status and undesirable behaviour, thus prohibits the latter but without unduly intervening in the former.[91]

The second significant difference is the draft omitted 'fair' and adjusted 'safeguarding fair competition' to 'safeguarding market competition order.' Some argue that the term 'fair' might cause unexpected counterproductive consequences. Inserting 'fair competition' in a competition law is likely to distort the market competitive process and society as a whole, because 'fair competition' is ill-defined and involves a value judgement. Furthermore, describing the specific approaches of 'fair competition' has also proven elusive. For example, inefficient undertakings might argue that competition is 'unfair' because it is hard for them to compete with their more efficient competitors.[92] This writer's opinion is, however, 'protecting fair competition' might have very special value for its psychological and educational effects in the context of a transition China. By declaring its attempt to protect fair competition, the AML will also obtain more support from the public. 'It is just unfair' — such feelings are accumulated among ordinary Chinese. The public began to suspect competition in contemporary China, which seems as a game process with a plenty of unwritten rules and hidden agendas. From this point, the Chinese national conditions, ideological dilemma, and governance crisis have made the transplantable conditions of competition law much more difficult than the law's original ecological environment in

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[90] AML art 1.

[91] *ABA* (n 35) (2005) 5 and (2003) 7 and 9.

[92] *ABA* (n 35) (2005) 6 and (n 48) 15.

Europe and USA. It proves again that it is extremely difficult to separate competition law from the political and historical framework in which it is set up.[93]

However, one might ask whether the objective of protecting 'the interests of consumers' is identical with 'maximizing consumer welfare'. Because rather than directly protecting consumers, the AML preserves competition mechanism, a dynamic process that encourages undertakings to reduce costs, improve quality, use resources efficiently, and thus to promote economic efficiency. By so doing, the AML will help increase consumer choices and promote consumer welfare.[94] Similar wording of 'protecting legitimate rights of consumers' has already been incorporated by the AUCL. Therefore, the different mechanism, principles, and ideas between the AUCL and the AML are blurred at this point. Having said that, it is arguable that one can not define 'consumer welfare' and 'consumer interests' as two completely different terms and it seems the confusion between the two terms is also a problem in other jurisdictions. For example, when researching the history of the US antitrust policy during the later New Deal (1935-1948), Peritz observes that the consumerist rhetoric suffusing the Public Utilities Holding Company Act of 1935 exemplifies 'a new vision of constituents whose problems and solutions, and whose interests, were largely economic'. And 'the later New Deal ... acted upon a body economic disaggregated into markets, classes, and interests, all of which appealed to a unified public interest of "consumer welfare"'. Peritz is right to point that 'such notion of "consumer welfare" is in sharp contrast to its revisionist use by recent Chicago Scholars'.[95]

3.3.2.2.2 Sociopolitical Objectives

The sociopolitical objectives of the AML are 'protecting the public interests' and 'promoting the healthy development of the socialist market economy', and therefore

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[93] *Dabbah* (n 46) 35.

[94] Lawrence S Liu, 'Jiangou Jingzheng Fazhi: cong Zhongguo Dalu Jingyan Tanqi' (Creating a Competition Law Regime: from the Perspective of Mainland China's Experience) (2004) 3 *Yuedan Minshangfa Yanjiu* (Yuedan Civil and Commercial Law Review) 7-9.

[95] Rudolph J R Peritz, *Competition Policy in America: History, Rhetoric, Law* (Oxford University Press, New York 1996) 134-135, and 358 n 63.

pave the way for 'a unified, open, competitive, orderly market system'.[96]

The public interest approach to competition law and policy may allow a better balance of different economic, social, and political objectives. However, the independence of competition law administration may easily become curbed, since what composes 'public interest' is questionable and the concept itself is an intangible and indefinable abstraction. In many situations, the perception of the so-called 'public interest' can be widely divided, and what might be claimed clearly by one party may be seen as less important or even immaterial by another. Therefore, the 'public interest' objective may cause significant tensions between interest groups and the implementation of the AML tends to become captive to the political process if it is actually employed to serve different stakeholders. Therefore, many of the political challenges made to competition law and policy are not, in reality, based on genuine public interest concern. Rather, they are challenges advanced by sectional groups with political clout, advancing their own narrow sectional interests, rather than in the true public interest.[97]

As regards the 'healthy development of the socialist market economy', what conduct could be categorized as 'healthy' or 'unhealthy' is questionable because such classification is unavoidably subject to the decision-makers' preference and thus is subjective and elusive. Because of its generality, adopting this objective could cause uncertainty in interpretation and application of the law, and may further produce conflicts with other objectives if regarded as an operational objective used to determine the lawfulness of specific conduct in particular cases.[98]

Although such an objective is criticized, this writer's view is that unless the socialist China changes its political colour, there is not much possibility to alter or omit this 'politically right legal declaration'. Competition legislation was unpopular everywhere

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[96] AML, arts 1 and 4; see, also, Shang Ming (n 22); Chen Lijie, 'Zhongguo Fanlongduan Lifa de Xianzhuang yu Wenti' (Present Situation and Problems of Anti-Monopoly Legislation of the PRC), in *Wang Xiaoye and Hiroshi Iyori (eds)* (n 33) 128-134.

[97] *World Bank and OECD* (n 47) 5; *Ehlermann and Laudati* (n 46) 58.

[98] *ABA* (n 35) (2005) 6 and (2003) 8-9.

before the end of the World War II and was particularly unacceptable in China until recently. For example, Before the World War I, the issue of cartel legislation became a major focus of political activity in Germany. The endeavours to enact a cartel law were significant in the development of political consciousness among population groups. This political 'awakening' was similar to the populist pressures that paved the way for the enactment of the Sherman Act in the USA. However, the political impetus for cartel legislation was opposed by 'the Bismarckian alliance between heavy industry, big agrarian interests and the bureaucracy'. After the 'long tug-of-war', Germany eventually enacted its Competition Statute (GWB) in 1957.[99] It is therefore inevitable to attach a political gloss to assure political acceptance and to get the legislation passed even though it is difficult to predict the extent of the potential political repercussions of the AML. One must accept the fact that the adoption of a competition law is a political act,' and thus to make certain compromise.[100] However, as once suggested, 'the political gloss in order to make the law saleable should not be confused with the objectives'.[101] In fact, a large amount of contemporary Chinese economic and even civil legislation have similar wording – it might simply be routine.[102]

3.3.2.2.3 Market Integration Objective: Will China Learn from Europe?

The market integration objective was indicated by *The Resolution of The Third Plenary Session of The 16th Central Committee of the CCP* in 2003. The Resolution states that one of the major tasks of establishing a modern market system in China is to strengthen the degree of the market integration. Rules that impede fair competition, set up administrative barriers, prohibit non-locally generated goods and services shall be revoked.[103] Reflecting such policy consideration, the third sociopolitical objective of

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[99] *Gerber* (n 68) 102-108, 275.

[100] *Ehlermann and Laudati* (n 46) 53-65.

[101] *Ehlermann and Laudati* (n 46) 17.

[102] For example, Contract Law 1999 art 1, Company Law 2005 art 1, Securities Law 2005 art 1, Trademark Law 1982 art 1, Foreign Trade Law 1994 art 1, Environmental Protection Law 1989 art 1, and Law of Certified Public Accountant 1993 art 1.

[103] 'Guanyu Wanshan Shehuizhuyi Shichang Jingjitizhi Ruogan Wenti de Jueding' (Resolution on Several Issues Relating to Perfecting the Socialist Market System) *People's Daily* (Beijing, 14 October 2003) 1.

China's Anti-Monopoly Law – facilitating the establishment of 'a national united, open, competitive, orderly modern market economy',[104] to some extent, is similar with the market integration objective of EC competition law both in theory and in practice. The EC experience therefore has potential value to the Chinese policymakers.

The market integration objective has been a first priority to the development of competition law in the EC. The Chinese economic reforms have also placed great emphasis on this goal during the past three decades. Although China is a unified polity, considering the status quo of the Chinese market, the elimination of sectoral monopoly and regional blockade in order to reduce artificial borders is generally considered as a priority among the country's development strategies. Developed by leaps and bounds, the Chinese market has however become fragmented. For example, apparently because of the economic rivalry and unbalanced development between provinces and regions, many provincial governments impose taxes and other fees on goods that are not produced in their administrative regions, and set checking-points at provincial borders to collect fees or even block free movement of goods.[105] However, the essential reason is that former monopolies are not willing to lose and thus make efforts to retain their privileges, which in turn increases entry barriers.[106] Such monopolistic actions severely constrain the ability of Chinese enterprises to grow organically and compete globally and thus damage the country's competitiveness and further development. Therefore, market integration and the fundamental economic objectives of the AML may complement each other in the Chinese context.[107]

Market integration involved many factors. One important issue of a market

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[104] AML, art 4.

[105] Qi Yudong, *Zhongguo Jingji Yunxing zhongde Longduan yu Jingzhen* (Monopoly and Competition in China's Economic Operation) (The People's Press, Beijing 2004) 135-147; Rick Yan, 'To Reach China's Consumers, Adapt to Guoqing' in *Harvard Business Review on Doing Business in China* (Harvard Business School Press, Boston 2004) 138-139.

[106] Anna Fornalczyk, 'Competition Policy During Transformation of a Centrally Planned Economy', in Barry Hawk (ed) *International Antitrust Law and Policy* (1993) Annual Proceedings of the Fordham Corporate Law Institute 385.

[107] Mark Williams, 'Competition Law Development in China', (2001) May Issue *Journal of Business Law* 285; Wang Xiaoye, 'Entering into the WTO accelerates the Chinese Anti-Monopoly Legislation', in *Wang and Hiroshi (eds)* (n 33) 172-175.

construction process is the reduction of government intervention in economic activities and the elimination of artificial borders that distort competition and block the exchange of goods and services. This desire has acted as an incentive for the development of EC competition law since the 1950s. EC competition law has frequently used it to help reduce governmental controls of economic production, which had been a normal phenomenon at certain period during the 20th century either as a result of wartime controls or as part of general economic policy. The law has also been used to discourage the distortion of markets by private firms, especially those that have enjoyed government support or protection.[108] This objective is consistent with China's economic reform and the legislative objectives of the AML, which focuses on establishing a modern economy operating on genuine market principles rather than on government control.[109]

In fact, China is not the only country that should aim its competition law at government actions along with private restrictive competition behaviour that could result in market segmentation. Competition law of other transitional economies focuses on the same issues. For example, articles 7 and 8 of Russian Competition Law prohibit local government from action that may result in restraints of competition. The same prohibition can also be found in the competition laws in Ukraine and Czech Republic.[110]

Nevertheless, such unique competition law objective must be construed and implemented with great caution in order to avoid unintended counterproductive outcome as we could learn from the EC competition law experience. The integration impetus of EC competition law has an important impact on the Commission's

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[108] *Gerber* (n 50) 327 and (n 68) 334-391.

[109] *Wang* (n 7) 201; Chenglin Liu, 'Competition laws in a Different Context: Managing Vertical Restraints in the Chinese Transitional Economy' (paper presented at the 5th Annual Conference of the Society of New Institutional Economics at University of California, Berkeley, 15-17 September 2001) 25-26.

[110] Ignacio De Leon, 'Fazhanzhong Guojia he Zhuangui Guojia Jingzheng Zhengce de Zhidu Fenxi' (Institutional Analysis of Competition Policy in Transition and Developing Countries), in *Wang and Hiroshi (eds)* (n 33) 112; John Clark, 'Restraints by Regional and Local Governments on Competition: Lessons from Transition Countries', (1999) 25 *Brooklyn Journal of International Law* 366.

decisions. Some commentators, however, claim that the EC pursues the objective of market integration sometimes at the expense of economic efficiency. For example, the consideration of market integration in competition analysis may discourage territorial restraints, which can sometimes be efficiency enhancing. A competition law that completely prohibits territorial restraints may thus reduce market efficiency.[111]

Perverse outcomes will arise if decision makers focus exclusively on market integration objectives and ignore the analysis on economic welfare. A good example is provided by the EC Commission's *Distillers* decision.[112] Although it has the potential to conflict with economic efficiency, efforts to integrate markets can and do facilitate entry and promote efficiency and thus may be compatible with the direct economic objective of competition law and policy. Nevertheless, the decision makers have to be aware that no matter which objective, economic or non-economic takes precedence, this does not imply close attention should not be given to other objectives. Instead, assessment against the competition law objectives could be made more transparent and coherent by considering each objective separately.

3.4 The Scope

3.4.1 Extraterritoriality: the Effects Doctrine in China

Similar to the situations of other major competition regimes,[113] Chinese competition law and policy is also facing increasing challenges caused by 'globalisation'. Since 2001, the proposed AML has adopted the 'doctrine of extraterritoriality' and appeared to choose the 'effects doctrine' as a basis to assert jurisdiction on monopolistic conduct

[111] *Ehlermann and Laudati* (n 46) 8; *Bishop and Walker* (n 52) 3-6; *ABA* (n 47) 37.

[112] *Distillers* [1978] OJ L50/16, [1978] 3 CMLR 173... 630, 635; Also see *Jones and Sufrin* (n 54) 678-679. In this case, the Commission condemned a dual pricing scheme and did not accept the argument that this was needed to protect Distillers' exclusive distributors on the Continent who spent considerable efforts on promotion and thus to prevent them from the 'free riders'. The result of this decision was an increase in the price of some brands in the UK and the withdrawal from sale of Johnny Walker Red Label in the UK – a clear reduction in consumer welfare (at least British consumers) with no offsetting benefits. Furthermore, other Distillers' brands ceased to be promoted on the Continent. The net result was therefore one in which the brands sold by Distillers in the UK now differ from those sold on the Continent. Therefore, such decision may actually have impeded the single market integration instead of promoting it.

[113] Brenda Sufrin, 'Competition Law in a Globalised Marketplace: Beyond Jurisdiction' in Patrick Copps and others (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing, Oxford 2003) 106.

occurring outside the territory of the PRC that 'has eliminative or restrictive effects on competition in the domestic market' of the PRC.[114] The wording of this provision seems unaltered over the years.

The doctrine of extraterritoriality in competition law and policy is an extremely difficult one and is highly questionable since it 'lies in the crossroads between law and politics and that the conflicts it has triggered involve important political questions'.[115] Therefore, as noted by Muchlinski, '[u]nilateral national regulation tends to create a global market divided by different policy regimes', and '[t]he extraterritorial application of law can have serious political effects'.[116] In spite of the doctrine's , case laws and academic theories developed in the USA and the EC make it clear that the 'effects doctrine' must be applied with great caution and extraterritorial jurisdiction in competition cases cannot be asserted without the presence of 'direct, substantial and foreseeable anti-competitive effects'.[117]

The uncontrolled expansive extraterritoriality established by the proposed law will, at best, render the provision unworkable, at worst, trigger future frictions between China and other jurisdictions because of the doctrine's potentiality to invade other countries' sovereignty. The wording of the effects doctrine implied by the AML is therefore suggested to be revised to 'monopolistic conduct occurring outside the territory ... that has direct, substantial and foreseeable eliminative or restrictive effects on competition in the domestic market of the P. R. China,'[118] and by so doing, establishing the minimum requirement of national nexus under public international law.

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[114] For example, the 2001, 2002, 2004, and April, July, and November 2005 Draft Anti-Monopoly Law art 2 para (2).

[115] *Dabbah* (n 46) 167.

[116] Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn Oxford University Press, Oxford 2007) 114 and 116.

[117] *Dabbah* (n 46) 163, and 167-186.

[118] ABA Joint Comments suggested that art 2 should be revised to include a standard of 'substantiality'. See *ABA* (n 35) (2005) 2 and 6-7.

3.4.2 Competition Law v Sectoral Regulations

One of the major differences between the April 2005 Draft and the previous drafts is the addition of a new article that renders the proposed law inapplicable to 'any conduct which is taken as legitimate according to other laws and regulations'.[119] Since the July 2005 Draft, this principle has been developed so that the proposed law 'does not apply where other laws or administrative regulations of relevant industries or sectors provide provisions'. The status of this principle has been also promoted from the supplementary articles to a general provision setting out the scope of the proposed AML.[120] Encouragingly, this provision was completed deleted by the Third Reading Draft and final wording of the AML. The potential conflicts between the AML and sectoral regulations and industry policy is discussed in related chapters.[121] However, one can easily recognise the compromise between the AML and industry policy, and common phenomena of conflicts in the hierarchy of Chinese laws.

3.5 The Key Concepts

3.5.1 Unfair Competitive Conduct (*Buzhengdang Jingzheng Xingwei*)

The subject matter of the AUCL is 'unfair competitive conduct', referring to conduct which impairs 'legitimate interests of other business operators and thus disturbs the social economic order.'[122] As discussed in 3.1.2 above, under the umbrella of 'unfair competitive conduct', the AUCL 1993 regulates eleven categories conduct that covers both anti-competitive behaviour and unfair trading practices.

3.5.2 Monopolistic Conduct (*Longduan Xingwei*)

The subject matter of the AML is 'Monopolistic Conduct', which refers to monopoly agreements, abuse of market dominant position and concentrations between undertakings which 'may have the effect of eliminating or restricting competition'.[123]

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[119] The April 2005 Draft art 55.

[120] The July and November 2005 Drafts, art 2 para 3.

[121] For discussion on the interface between industrial and competition policy, see, 8.5 below.

[122] AUCL 1993 art 2. Also see 3.1.2, above.

[123] AML art 3. See detailed analysis of the concepts of 'restrictive agreements', 'abuse of dominant market position'

3.5.3 Undertakings (*Jingyingzhe*)

The concept of 'undertaking' has been chosen to substitute the former notion of 'business operator' in previous AML drafts. Such a change was regarded as a welcome improvement by commentators. Under the AML, an 'undertaking' refers to 'natural persons, legal persons or other organizations that engage in manufacturing or operating commodities, or providing services.'[124] It has been suggested that such a definition might be too narrow and uncertain. It should be clarified to encompass all forms of economic actors, including individuals, partnerships, cooperatives, corporations, professional or trade associations, no matter it is private, public or private-public mixed ownership.[125]

3.5.4 Relevant Market (*Xiangguan Shichang*)

The concept 'relevant market' has replaced the former notion 'given market' and 'specific market'.[126] Instead of defining a market in purely geographic terms as in the previous drafts, since the July 2005 Draft, the concept has been given both product and geographic dimension. It is also the first time the lawmakers have accepted concepts of 'substitutability' and 'elasticity of demand'. A 'relevant market' is finally defined by the AML as 'the scope of product or territory within which undertakings compete against each other as regards specific products or services during a certain period of time'.[127]

3.6 Concluding Remarks

The review on the historical developments of the Chinese competition law once again

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and 'concentrations' at relevant chapters.

[124] AML art 12 para 1.

[125] Civil and Commercial Law Research Section of Shanghai Social Science Institute, 'Guanyu Zhonghuarenmingongheguo Fanlongduanfa (Songshengao) de Xiugai Yijian (Revising Suggestions on Anti-Monopoly Law of PRC (2004 Submission Draft)) (2005) 4 *Shangwu yu Falu* (Commerce and Law) 45-46.

[126] For example, the July 2004 Draft art 4.

[127] AML art 12 para 2.

proves that 'it is difficult to separate competition law from a political perception.'[128] The AML is expected to improve the regulatory environment, protecting the competitive process and improving economic efficiency in a transitional China. However, transplantation and localization of competition rules are heavily constrained by the Chinese *guoqing* (national conditions). The case of establishing competition law and policy in the PRC reflects dilemmas and challenges transitional countries facing today. As a special mixture of legal, economic, and political issues, competition law requires time to understand and to implement effectively. There are certainly no exceptions available to the PRC.

[128] *Dabbah* (n 46) 69.

4

Abuse of Administrative Power to Eliminate or Restrict Competition

4.1 Introduction

Because of 'path dependence' of the previous central-planned economy, the connection between the government and enterprises has not been completely separated in the PRC.[1] Rapid economic growth has been accompanied by increased scepticism about government's role. Critics of the government say that the state is overly intrusive, governments create monopoly, and government failures are just as pervasive as market failures. For some, government is the problem rather than the solution. Using or abusing public power to restrict competition is typical phenomena in the PRC. The Chinese policymakers have attempted to use administrative power to check administrative power over the past three decades. Rules on prohibiting abuse of administrative power to restrict competition under the AML are a case in point. How these rules have developed under the current legal and regulatory framework and how they have been designed under the AML are questions to be answer by this chapter. Case studies are provided, which shed further light on the difficulties to prohibit abuse of administrative power under the current political equilibrium. The chapter is ended by a proposal that calls for reform on a number of aspects, including substituting the concept 'administrative monopoly' with available alternatives, transplanting the

[1] 'Path dependence' is a term that has come into common use both in economics and other intellectual disciplines (including history, politics, sociology and law). See, K J Arrow, *Social Choice and Individual Values* (2nd edn Yale University Press, New Haven 1963) 119-120, and, S E Margolis and S J Liebowitz, 'Path Dependence' < http://ftp.utdallas.edu/~liebowit/palgrave/palpd.html>. The path dependence theory has been offered as an alternative analytical perspective for social sciences. For example, North argues that '[p]ath dependence means that history matters. We cannot understand today's choices (and define them in the modeling of economic performance) without tracing the incremental evolution of institutions'. North illustrating path dependence by asking what happens when a common set of rules is imposed on two different societies. He noted that in the nineteenth century, many Latin American countries adopted constitutions modified based on the U.S. Constitution. Also, Third World countries have adopted property rights laws of successful Western countries. However, because the way enforcement occurs, the norms of behaviour, and the subjective models of the actors are different, the results are not similar to those in the USA or other Western countries. North concludes that 'the common imposition of a set of rules will lead to widely divergent outcomes in societies with different institutional arrangements', and '[o]nce a development path is set on a particular course, the network externalities, the learning process of organizations ... reinforce the course'. See, D C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge 1990) 99-101.

principle of proportionality, etc.

4.1.1 Definitional Issues

4.1.1.1 What is Meant by 'Administrative Monopoly'

'Administrative monopoly' (*xingzheng longduan*), a term first used by a Chinese economist in 1988,[2] widely referred to and examined by scholars and seemed to be accepted by Chinese legislators.[3] Evidently the composition of administrative monopoly mainly depends on the scope of the concept itself, which is, however, by no means a simple and immediately recognizable discourse. As observed by scholars, a major problem to fight against administrative monopoly is the definition itself. If it is monopoly initiated by the government, which organisation should be entrusted with competent power to scrutinize it? The available definitions are ambiguous, confusing, either too broad or too narrow and have caused numerous theoretical and practical difficulties over the years.

For Dr. Hu, administrative monopoly referred to an absolute monopoly situation caused by a centralized governmental system which totally controls production and distribution for the whole society. Such monopoly is, by nature, distinct from economic monopoly.[4]

In 1989, the concept was first referred by a legal scholar without further definition.[5] In 1990, Professor Wang Baoshu defined the concept from a legal prospective as 'in contrast with economic monopoly, administrative monopoly refers to a situation that

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[2] Hu Ruyin, *Jingzheng yu Longduan: Shehuizhuyi Weiguan Jingji Fenxi* (Competition and Monopoly: Socialist Microeconomic Analysis) (Sanlian Publishing, Shanghai 1988) 48.

[3] Although Chinese legislators regarded 'the prohibition of administrative monopoly' as the most unique creation of China's competition law, provisions on administrative monopoly were deleted from the draft Anti-Monopoly Law in late 2005. The main reason for omitting administrative monopoly, according to commentators, was the unenforceability of the related provisions and the inability of the competition authority to challenge state bodies. The AML's uncertain future and unavoidable dilemmas caused by the so-called 'administrative monopoly' had become one of the fiercest fighting points during the Annual Plenary Session of the NPC in March 2006. See, for example, Huang Yikun, 'Fanlongduan de Ganga Guoqing' (The Awkward National Conditions for the Anti-Monopoly Law) *Jingji Guancha* (Economic Observation) (Beijing 16 January 2006).

[4] *Hu* (n 1) 48.

[5] Wei Jian, 'On Chinese Anti-Monopoly Legislation' (1989) 3 *Zhongwai Faxue* (Journal of Chinese and Foreign Law).

national economic regulators and local government eliminate, restrict, or hinder competition between economic operators by abusing administrative power.'[6] In the same year, another legal scholar defined the concept as 'certain administrative organisations and their officials, by using administrative power to perform governmental functions, monopolize resources and market, and further seek ends which are inconsistent with the aims and functions of the government.'[7] Since then, officials and scholars have defined and commented on the concept of administrative monopoly. The indeterminacy and perplexity of the concept began to arise.

For example, Wang Yang gave a definition of 'behaviour of the state, by using public authority, which eliminate or restrict competition.'[8] Zheng Pengcheng defined the concept as 'behaviour of administrative organs, by using administrative power, which restrict competition and impede order of the socialist market economy.'[9] For Jung and Hao, administrative monopoly is 'monopolistic activities initiated by government agencies at various levels by abusing regulatory or administrative power.'[10]

Outside China, legal experts also observed this phenomenon and offered comments over the years. Owen and others defined the concept as 'government-created monopolies' by 'abusing regulatory power.'[11] Mason and Hou described the concept as 'improper governmental intervention in the market.'[12] Nathan Bush's definition is 'the abuse of power for anticompetitive ends'.[13]

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[6] Wang Boshu, 'Corporate Concentration and Prohibition on Monopoly' (1990) 1 *Faxue Yanjiu* (Law Research).

[7] Li Zhongshen, 'Several Questions of Administrative Monopoly' (1990) 2 *Zhengfa Luncong* (Politics and Law Review).

[8] Wang Yang, 'General Theory and Basic Mechanism of Anti-Monopoly Law' (1997) 2 *Chinese Law.*

[9] Zheng Pengcheng, *Xingzheng Longduan de Falu Kongzhi Fenxi* (Research on Legal Control of Administrative Monopoly) (Peking University Press, Beijing 2002) 7 and 30.

[10] Youngjin Jung and Qian Hao, 'The New Economic Constitution in China: A Third Way for Competition Regime?' (2003) 24 *Northwestern Journal of International Law and Business* 9.

[11] Bruce M Owen and others, 'Antitrust in China: The Problem of Incentive Compatibility' AEI-Brookings Joint Center for Regulatory Studies (2004, revised 2006) < http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/php7d.pdf> 8-9.

[12] Daniel Mason and Athena Hou Jiangxiao, 'China's Proposed Anti-monopoly Law: the US and European Perspective' (2004) November *Asia Law* 7.

[13] Nathan Bush, 'Chinese Competition Policy: It takes more than a law' (2005) May-June *China Business Review* <http://www.chinabusinessreview.com/public/0505/bush.html>.

Williams defined administrative monopoly as 'the use by government, at all levels, of administrative power, both legal and extra legal, to promote, manipulate, impede or prevent economic activities that are deemed to be inimical to the interests of a sector of the economy that requires some form of promotion or protection'.[14] Years later, in his monograph on competition law and policy in Greater China, Williams adjusted the wording of his definition from 'use' to 'misuse' and omitted '(economic activities) that are deemed to be inimical to the interests of a sector of the economy that requires some form of promotion or protection.'[15] But Williams provided no further explanation as regard what is meant by 'misuse'.

The series drafts of the proposed AML once offered a definition as 'abuse of administrative power by government agencies and their subordinate departments that eliminate or restrict competition'.[16] The AML final wording avoids using the concept 'administrative monopoly'. 'Administrative agencies and organisations with responsibilities for public affairs administration' are prohibited from abusing their 'administrative power to eliminate or restrict competition'. Therefore, the scope of the concept has been enlarged.[17] However, the notion 'abuse' has been left open without further guidance. Instead, the AML sets out an illustrative but not exhaustive list of behaviour such as 'forced transaction', 'sectoral monopolies', 'regional blockades', 'forcing undertakings to conduct monopolistic behaviour', and 'promulgating rules to eliminate or restrict competition'.[18] Furthermore, it is not clear that whether the scope

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[14] Mark Williams, 'Competition Law Developments in China' (2001) May Issue *Journal of Business Law* 275.

[15] Mark Williams, *Competition Law and Policy in China, Hong Kong, and Taiwan* (Cambridge University Press, Cambridge 2005) 138-139. The full definition given by Williams is: 'the misuse by government, at all levels, of administrative powers, both legal and extra-legal, to promote, manipulate, impede or prevent economic activities'.

[16] See, for example, the July 2004 Draft art 3(4).

[17] The full definition of 'administrative monopoly' provided by in the AML is: 'Administrative agencies and organisations empowered by laws and regulations with responsibilities for public affairs' ... 'abuse their administrative power to eliminate or restrict competition'. See Article 8 AML.

[18] See 4.3, below.

of 'regulations' covers both 'administrative regulations' and 'local regulations'.[19]

In fact, the notion 'abuse of administrative power to eliminate or restrict competition' has been chosen to substitute the concept 'administrative monopoly' since the July 2005 Draft. However, the concept 'administrative monopoly' continues to appear at literature, media, and official news release even after the enactment of the AML.[20] Therefore, it appears the concept has already been accepted although it was not chosen by the AML.

4.1.1.2 Criticism

From this brief literature review on the concept of administrative monopoly, the common understanding is that 'administrative monopoly' is behaviour of authorities, by exercising public power, which restrict or impede competition. However, divergences and confusions are more prevalent:

(1) The first problem is 'to whom is the concept addressed'? There is uncertainty regarding the subject matters of administrative monopoly.

(2) Another major problem is the dilemma of 'use' and 'abuse'.

(3) Furthermore, some definitions are unduly narrow. For example, according to Owen's definition, what happens if an administrative organisation directly carries out of economic activities? It might not 'organise' the market by using its 'regulatory power' but participate in the market by using its general administrative power to restrict or eliminate competition.[21] A good example is the *Yongchun* case.[22] Another danger is defining the concept in a way which makes it unmanageably large, taking Mason's definition for instance.

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[19] See 2.4.3, above.

[20] See for example, Zheng Manning, 'Ziran longduan xingzheng longduan zenme fan?' (How to regulate natural monopolies and administrative monopoly?) *Renmin Ribao* (People Daily) (Beijing 3 September 2007).

[21] JLB Sierra explains that the State may play two different roles: (1) carrying out regulatory activities to organize the market by acting as a public authority; (2) participating in the market to offer services or goods like any other operator by acting as a public undertaking. State measures of the first role subject to Article 31 and 86 of the EC Treaty. By contrary, behaviour of public undertakings subject to Article 81 and 82 of the EC Treaty. See JLB Sierra, *Exclusive Rights and State Monopolies under EC Law: Article 86 (Formerly Article 90) of the EC Treaty* (Oxford University Press, Oxford 1999) [1.44] and [4.09].

[22] See 4.4, below.

Further analyses are as below.

4.1.1.3 Subject Matters of the Concept 'Administrative Monopoly'

4.1.1.3.1 The Levels of Administrative Authorities

Some commentators claim that 'administrative authorities' only refer to local authorities but not the central government and its departments. It is submitted here that the concept should include not only local authorities but also the administrative authorities at the central level. Otherwise, the AML would be unable to deal with numerous restrictive behaviours initiated by the ministries and department of the central government. The question of how should the AML regulate administrative power at the central level is however another question which will not be discussed at the present section.

4.1.1.3.2 The Scope of Administrative Authorities

Another question is how widely the scope of 'administrative authorities' is. Will it also include certain types of legislative or judiciary power? It is not an uncommon phenomenon in China that local legislatures include provisions that distort competition and local judiciary delivered judgments that discriminate against non-local undertakings or even reserved market of local legal service to designated law firms.[23] Therefore, if the answer to the above question is no, the law would be incomplete without competency to deal with such 'legislative and judicial power'. However, if the answer is yes, there are logical reasons to both modify the name and enlarge the scope of the concept. For example, there are obvious gaps between Wang Yang's definition and the concept in question[24].

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[23] Zheng Pengcheng provided another notion 'guanshang longduan' (monopolies caused by 'red-collar' merchants (merchants who are also officials)). Zheng stated that, such a concept is overlapping with administrative monopoly but also includes other monopolies caused by the judiciary, the military, other political or autonomous organisations such as the Communist Youth League and the Women's Association, and even by CCP committees and other organs, which, all are not 'administrative organs'. However, one might be puzzled by such an idea and might further ask how a civil organisation as the Women's Association could be categorized as 'official'? What is the nature of 'the CCP organs'? Are they special organs parallel, below, or above the legislature, the judiciary, and the executive? Zheng offered no explanations to any of these questions. See, *Zheng* (n 8) 42-43.

[24] *Wang* (n 7).

4.1.1.4 Administrative Power, Public Authority and State Measures

If the scope of the concept extends to all public authorities, the 'administrative power' in the definition should be substituted by 'public authority' or the EC concept of 'state measures', the latter has potential value to China's competition legislation and implementation. For example, Article 86(1) of the EC Treaty is aimed at combating the introduction or maintenance of certain state measures by Member States. The EC Commission has taken the view that the concept of 'state measures' covered 'laws, regulations, administrative provisions, administrative practices, and all instruments issuing from a public authority, including recommendations'.[25]

4.1.1.5 Use, Misuse and Abuse

Not only 'misuse' or 'abuse' is an unclear concept, it also causes analytical difficulties and daunting obligations in the burden of proof. Distinguishing 'abuse of administrative power' from 'legitimate use of administrative power' may be a highly complicated issue, and the wording of the law will require the AML authority to define and apply the ambiguous concept of 'abuse', and further prove the existence of 'abuse'.[26]

In 2005, the ABA submitted that the related provisions could be adjusted as follows:

> No government, government department, or government employees may, through formal or informal use of administrative power, (1) require undertakings or individuals to purchase commodities form an undertaking designated by a government, government department, or government

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[25] See: Recital 1 of *Commission* Directive (EEC) 70/50 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions [1970] OJ Spec. Ed. 17.

[26] It is noteworthy that currently the AML entrust administrative agencies at higher levels to order the administrative agencies or other public organisations that abuse their administrative power to restrict competition to make correction. The AMEA can make proposals to the relevant superior agencies to handle the cases in accordance with the law. See, AML art 51.

employee; (2) restrict access by undertakings to markets for commodities or restrict the free flow of commodities between regions; or (3) compel undertakings to engage in conduct otherwise prohibited under this law. This article does not apply to government action taken in accordance with the specific authorization of other laws and regulations ...[27]

The ABA experts noted that this formulation may address the same concerns as the prohibition on abuse of administrative powers without defining the unclear concept of 'abuse'. Through this approach, the authority would (1) determine whether the challenged administrative conduct results in any of the three listed anticompetitive effects, and (2) determine whether the challenged conduct was 'in accordance with the specific authorization of other laws and regulations.' The second step thus focuses directly on the legal basis and purpose of the government department's administrative authority.

However, one might ask, what happens if the challenged conduct is the result of a specific authorization of other laws and regulations? Would that mean the conduct implies no competition concerns and is lawful because of its 'legal base'?

4.1.1.6 The Overlap between Related Concepts

A detailed examination of the concepts of 'monopoly', 'natural monopoly', 'state monopolies', and 'legal monopoly', etc. is beyond the limits of the present thesis; accordingly what followed are a brief but necessary outline and a comparison between several related concepts.

Monopoly, an opposite extreme to perfect competition, is an ambiguous word, which often has different implications for legal professionals and for economists. It usually refers both to a given situation, where there is only one seller but many buyers in a

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[27] ABA: *Joint Submission of American Bar Association's Sections of Antitrust Law, Intellectual Property Law, and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China*, at: <http://www.abanet.org/antitrust/comments/2005/05-05/commentsprc2005wapp.pdf> 26-27.

relevant market and to behaviour that attempt to monopolize relevant market.[28] 'Monopoly leads to allocative inefficiency because there is a difference between the marginal cost of production and the valuation of the marginal consumer.'[29] The undertaking that exclusively controls the supply of goods and/or services is a 'monopolist'. Monopoly covers both exclusivities by laws and regulations, or by authorities using discretionary power (for example, legal monopoly, exclusive rights under Article 86 of the EC Treaty, and administrative monopoly under Chinese competition law, etc.), and those that are purely or basically factual (for example, a 'dominant position' in the context of EC competition law).

4.1.1.6.1 Natural Monopolies

Economists speak of natural monopolies in situations where the market is more efficiently served by a sole undertaking. The classic example has traditionally been those undertakings that supply a service through a network, in sectors like telecommunications, the supply of electricity and so on. For these undertakings, the fixed costs are considerable compared to the variable costs, which leads to a situation where the survival of more than one undertaking in the market is impossible. On this basis, it is possible to speak of an objectively justified exclusivity that arise from factual situations, but not generated, in principle, from the exercise of discretionary state powers.[30] However, as noted by Sierra, although natural monopoly may be a fact, its existence and maintenance by a specific undertaking derives from State intervention. It is difficult to find, in the real world, clear examples of natural monopolies whose status does not depend to a certain extent on the will of the regulators.[31]

The concept of natural monopoly further has dynamic and evolving characteristics that can cause significant challenges and difficulties to regulation and regulators. The

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[28] Alison Jones and Brenda Sufrin, *EC Competition Law: Text, Cases, and Materials* (2nd edn Oxford University Press, Oxford 2004) 8.

[29] Simon Bishop and Mike Walker, *The Economics of E.C. Competition Law: Concept, Measurement and Application* (2nd edn Sweet and Maxwell, London 2003) 23, 2.20.

[30] *Jones and Sufrin* (n 27) 8-9.

[31] *Sierra* (n 20) 10 and 25.

nature of natural monopoly is determined largely by economic and technological factors that may change over the time. As a result, what is defined as a natural monopoly at a given time and in a given place will not necessarily be so under different circumstances.

Taking the EC approach on natural monopoly for example, 'the legal environment (of natural monopoly) keeps changing to take into account technical, economic and social developments.'[32] The courts also favoured such a dynamic approach, for example, in the Judgment of *RTT*, the ECJ used a wording of 'at the present stage of development of the Community',[33] which left the possibility to take into account of future technological development and re-evaluate the existing monopolies traditionally considered to be 'natural'.

Natural monopoly manifests itself mainly as 'sectoral monopoly', which is one of basic categories of administrative monopoly in China. Therefore, the concept of 'administrative monopoly' and 'natural monopoly' can be overlapping to a certain degree. Nonetheless, sectoral monopoly is not necessarily related to 'natural monopoly', taking tobacco and alcohol monopolies for example.

4.1.1.6.2 State Monopolies

Some Chinese scholars claimed that state monopolies and administrative monopoly, by their very nature, are different. For example, Liang Huixing defines the former as 'monopolies initiated by the central government through lawful measures, which represented the country's whole interests.'[34] Zheng observes the differences between administrative monopoly and state monopolies.[35] He argues that the subject of state monopolies is the state, while the subject of administrative monopoly is administrative

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[32] Francoise Blum and Anne Logue, *State Monopolies under EC Law* (John Wiley & Sons, Chichester 1998) 1.

[33] Case C-18/88 RTT [1991] ECR at I-5797, para. 16.

[34] Liang Huixing, 'Opinions on China's Anti-Monopoly Legislation', (1991) 6 *Falu yu Shiyian* (Law and Practice).

[35] *Zheng* (n 8)35-36.

organs. Morover, the state uses state power to initiate State monopolies, while administrative organs use administrative power to initiate administrative monopoly. In addition, the origin of state monopolies is public interests and the state interests, while the origin of administrative monopoly is regional and personal interests. Zheng further offers exclusive distribution of alcohol and tobacco as examples of state monopolies. Finally, state monopolies are lawful but administrative monopoly is illegal. The legality of state monopolies rests on explicit authorization of laws, for example, monopoly rights granted by the Postal Law and Tobacco Monopoly Law. Zheng, however, went on to explain that lawful state monopolies could become irrational because of the development of economy and technology. For example, former state monopolies in telecommunications began to open for competition.

Nevertheless, Liang and Zheng's approaches have inevitably led to the relationship of the two concepts more blurred. First of all, 'the State acts only through its organs.'[36] The state organs include the legislative, the executive (administration), and the judiciary. Secondly, power is one element of the State. The state power is distinguished between three different components: the legislative, the executive, and the judicial power.[37] Therefore, 'the state uses state power to initiate state monopolies' can be rewrite as 'the state, through its legislative, executive (administrative), and judicial organs, uses corresponding legislative, executive (administrative), and judicial powers, to initiate state monopolies'. Logically, administrative monopoly should be a type of state monopolies.

Thirdly, the legality of state monopolies, as already admitted by Zheng, is relative rather than absolute.[38] If administrative monopoly is one form of state monopoly, its

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[36] Hans Kelsen, *General Theory of Law and State* (Russell & Russell, New York 1973) 195.

[37] Kelsen noted that, 'The State is thought of as an aggregate of individuals, a people, living within a certain limited part of the earth's surface and subject to a certain power: One State, one territory, One people, and one power... Though the unity of the power is held to be essential... it is ...possible to distinguish between three different component powers, the legislative, the executive, and the judicial power of the State.' See *Kelsen* (n 35) 255.

[38] In the EC, the theoretical debate concerning the law relating to exclusive rights granted by state measures is focused on the question of the legality of such rights. See, *Sierra* (n 20) 363. There are undeniable similarities between 'exclusive rights and State monopolies' under EC Law and 'administrative monopoly' under Chinese Law. The relevance of EC experience to the Chinese competition law deserves an in-depth research.

legality should be also relative. There should be no reason to explain why administrative monopoly should be regarded as illegal *per se*. One reason might be 'the abuse of administrative power' as a precondition of constituting an 'administrative monopoly'. However, would that mean monopolies caused by 'proper use' of administrative power are not 'administrative monopoly'? Then what are they? A further question is that if 'the legality of State monopolies rests on explicit authority of laws', as observed by Zheng, whether every explicit authority of laws is legal? Furthermore, whether monopolies explicitly authorized by regulations, therefore, can be regarded as necessarily illegal without the need for any further analysis?

Fourthly, one could hardly find objective criteria available to define the concepts of 'state interests', 'social interests', 'public interests', 'regional interests', and 'personal interests'. Which test(s) could be employed to justify some but repudiate others? One may further ask whose or what kind of interests should competition law serves. These questions once again are related to unsettled discussion and debate on competition law objectives. Much needs to be done in the PRC, like what has learnt from the EC competition law experience, to clarify 'factors such as why and how competition law systems were created, which ideas, objectives and value have influenced decision-making within them, and the extent to which they have achieved the objectives set for them'. Otherwise, Chinese competition law and policy's 'identity' remains and will continue to remain veiled.[39]

In addition, when explaining the relative nature of state monopolies, Zheng referred to the telecommunications sector, a typical representative of traditional natural monopoly. A logical reasoning could be that if 'administrative monopoly' is a form of 'state monopoly', and 'administrative monopoly' is overlapping with 'natural monopoly', it could therefore be claimed that these three concepts unavoidably overlap.[40] The

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[39] David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1st paperback edn Oxford University Press, Oxford 2001) 2.

[40] European law *practitioners* Blum and Logue, also referred 'State monopolies' to 'undertakings which have a close relationship with the State and have been granted certain privileges by it. These undertakings generally include the utility companies but may extend to companies in other sectors.' See, *Blum and Logue* (n 31) 1.

uncertain relationships between 'state monopoly', 'natural monopoly', and 'administrative monopoly', therefore, have to be further explored in future interpretation and implementation of the AML. Furthermore, Liang and Zheng's approach also equals 'state monopolies' and 'statutory monopoly' as being synonymous.

4.1.2 The Cause and Consequence of Abuse Administrative Powers to Eliminate or Restrict Competition

Although detailed analysis is beyond the scope of this thesis and should be reasonably left to scholars of economics and politics, a brief introduction is necessary for justifying the imperative of scrutiny.

This author's literature review and documentary analysis indicated that the immediate cause of administrative monopoly is that, in a highly concentrated government system without sufficient check and balance, officials at various levels fight for profits against the 'economic man'.[41]

The intermediate origin of administrative monopoly, however, is an irrational wealth distribution system implemented since the late 1970s. In such a system, a centralised vertical political power coexists with decentralised powers in financial revenues between the central and local government through public ownership such as State-owned enterprises (SOE). Profits of SOE, to a great extent, were distributed among related bureaux as sources of administrative revenue.[42]

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[41] See 2.3, above. 'Economic man' or homo economicus, the economist's model of human behaviour, is at the heart of economic theory. In classical economics and neo-classcial economics, man (a human) was assumed as a rational, perfectly informed and self-interested actor who desires wealth, avoids unnecessary labour, and has the ability to make judgements towards those ends. It was John Stuart Mill who used the term 'economic man' for the first time. See, Joseph Persky, 'Retrospectives: The Ethology of Homo Economicus' (Spring, 1995) *The Journal of Economic Perspecitves* 221-23; and John S Mill, *Essays on Some Unsettled Questions of Political Economy* (2nd edn Longmans, Green, Reader & Dyer, London 1874) essay 5, paras. 38 and 48. Although the term did not come into use until the 19th century, the idea is often associated with earlier thinkers such as Adam Smith and David Ricardo. For example, in *The Wealth of Nations* (Vol. IV), Adam Smith explained how rational self-interest and competition through the working of the 'invisible hand' can lead to economic well-being and prosperity.

[42] See, for example, The Economic Research Institute of the State Planning Commission, 'Dapo difa shichang fenge de celue yanjiu' (Research on strategies to break local market blockades) 2001 (27) *Jingji Yanjiu Cankao* (Economic Research Reference); Zhao Ying, *Zhongguo Gongye Zhengce Shizheng Yanjiu* (Empirical Analysis on China's Industry Policy) (Social Science Documentary Publishing, Beijing 2000) 147; *Zheng* (n 8) 63-75; Qi Yudong, *Monopoly and Competition in China's Economy Operation* (The People's Publishing, Beijing 2004) 135-147.

The Chinese socialist planning system was so designed that SOE were under dual leadership. Vertically, each SOE belonged to one sector led by a ministerial-level regulator under the State Council and thus subject to the regulator's policies. At the same time, except those that were directly operated by the sectoral regulators, the enterprises were also horizontally subject to the directions of or owned by local government at different levels, depending on their size, importance and formation. Despite reform efforts to separate administration of government from enterprises management, institutional design and vested interests have strengthened the so-called 'strip' (sectoral monopoly initiated by vertical sectoral authorities) and 'block' (regional blockade initiated by horizontal authorities) fragmentation, through which the growing power of 'rent-seekers' reserve incentive and power to engage in restrictive activities.

Regional blockade is also driven by economic (increasing local revenue) and political (promotion of local government officials' depends partially on local economic performance) considerations. Local governments take various measures to prevent or discriminate against non-local products and services and effectively set up regional protectionism. Those measures include forbidding local business from engaging in wholesaling or retailing non-local products; applying discriminative standards in quality inspection, technical requirements and licensing; fixing price or setting price standards for non-local commodities; and setting up checking points on the local border to obstruct, intercept or even confiscate products originating in other regions.

Nevertheless, the deeper economic reason of regional blockade has to be searched in an industry structure with similarities, duplications and insufficient comparable advantages. Such a structure, formulated according to Chairman Mao's war time economic strategies, has led to Chinese undertakings small in scale and scope, less developed in technology, but exist in a 'small but all' regional industry system. Local

officials, prompted by the above mentioned economic and political reasons, have competed for projects and investment, and worsen such similarities. Statistics show that, among China's 32 provincial regions, there are 27 regions producing motor vehicles, 29 regions producing TVs, 23 regions producing refrigerators and washing machines, etc.[43] From this point of view, one can reasonably expect that, to combat the so-called 'administrative monopoly', legal instrument on its own is not sufficient.

Widespread 'administrative monopoly' has become the most formidable malignancy in Chinese economy. It facilitates misusing resources, causes inefficiency, delivers goods and services to be inferior in quality and higher in price, creates income gaps, induces corruptions, and frustrates the formation of 'an integrated, open, competitive, well-organised modern market system' in China.[44]

There is common understanding on the necessity and urgency to deal with 'administrative monopoly'. However, the real problem is determining how it could be dealt with. China's present economic reform began in 1978. After almost three decades, the economic transition has not been completed and a substantive political transition has not begun. The present economy features as a semi-market mechanism. The so-called 'administrative monopoly', as a coexisting phenomenon of the unaccomplished transition, creates incredible huge rent-seeking opportunities during the process of market liberalization. To become rich or to stay poor, to a great extent, depends on whether one could grasp the opportunities and seek the 'rent' – *quids pro quos*.[45]

In recent years, the media have been full of reports on corruption, bribery, money laundering and degeneration of officials and merchants, on the immense gap between the rich and the poor, and on the widespread social inequality. People once believed

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[43] *Qi* (n 40) 425-426.

[44] The Third Plenary Session of the Sixteenth Central Committee of the Chinese Communist Party declared that 'establishing an integrated, open, competitive, and well-organized modern economy system' is one of the CCP's seven major tasks of improving the socialist market economy system. See Speech by Hu Jintao, General Secretary of the Central Committee of the CCP, during the Session on 14 October 2003. See *China Daily* (Beijing 15 October 2003) 1.

[45] Hu Angang, a leading Chinese Economist, argued that administrative monopolies simply are corrupt. See, *Beijing Qingnian Bao* (Beijing Youth Daily) (Beijing 24 September 2001).

that market privatization in China will result in social reform. Unlocking China's economic potential will also spur its political reform. And after China's entering the WTO, officials and merchants would have to follow international business practice and thus reduce corruption. But now, people began to ask how could 'economic reform' become, to a great extent, a pronoun for 'wealth plunder'?

On the one hand, the government and many scholars place great hopes on the AML and on the establishment of 'socialist rule of law'. People all believe that not only should the law learn from developed counties, it also should be based on China's conditions.[46] The prohibitions on administrative monopoly by the AML are beneficial for officials not only to distinguish between right and wrong, legal and illegal, but also to improving their awareness of competition policy. Others claimed that without changing the functions of the Chinese government from an all-powerful to a limited government, using law to deal with administrative monopoly would be insufficient.[47] For example, according to Article 30 AUCL 1993, any person or entity that abuses government or administrative power to restrict competition will be ordered by administrative organs at higher levels to make corrections. The AUCL further does not allow for the victims of such actions to resort to legal process according to the Administrative Litigation Law 1989. This provision has been proved vulnerable in practice because the government is not only the rule-maker, the umpire, but also the game player.[48] Hence, there will be no better chance for the AML.[49] But the commentators keep silent on how to change the government or they presume that the establishment of the 'socialist rule of law' could resolve the problem.

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[46] Hu Jian, 'Fanlongduan Fa Shouxian Yao Fan Xingzheng Longduan' (The First Task of the Antimonopoly Law is to Combat Administrative Monopoly) *Zhongguo Zhengzhi Xue* (Chinese Politics) 3 November 2004.

[47] Du Liang, 'YiZhi Kongwen – Fanlongduan Fa Fandeliao Xingzheng Longduan ma?' (A Mere Scrap of Paper – Can the Antimonopoly Law Combat Administrative Monopoly?) *ZhongGuo Qiyejia* (Chinese Entrepreneurs) 18 September 2004.

[48] See Judgement of the *Yongchun* Case at 4.4, below.

[49] Wang Hongyu, 'Xingzheng Longduan Buyi You Fanlongduan Fa Guiding' (The Antimonopoly Law should not Include Administrative Monopoly) *ZhongGuo Zhengzhi Xue* (Chinese Politics) 2 November 2004.

On the other hand, Chinese economists argue that without privatizing and confirming property rights of SOE, establishing private ownership fundamentally, and further rationalizing the present industry structure, the AML would be a mere scrap of paper, which cannot prevent administrative power from unduly invading the market. Thus, China should not just copy competition law from developed counties, and further confuse economic monopoly with administrative monopoly.[50] Outside China, Williams commented that 'the oddity of a monolithic, single party, non-democratic government having to issue a legal prohibition to prevent other parts of the same government from breaking or abusing its own administrative powers is an unusual phenomenon.'[51]

In addition, it has been subjected that competitive concerns over other government departments should be addressed by deregulation programs or regulatory reform initiated by the central government. For example, in recent years, the OECD has tried to bring attention to the importance of regulatory reform because driving out anti-competitive practice from the market through competition law is not made possible until sufficient regulatory reform is achieved. For example, the Korea Fair Trade Act has several provisions that promote cooperation between Korea's Fair Trade Commission and relevant Ministries that have authorities to regulate certain industries.[52]

Figure 4.1 Should the Anti-Monopoly law deal with administrative monopoly?[53]

(Total Respondents: 279)

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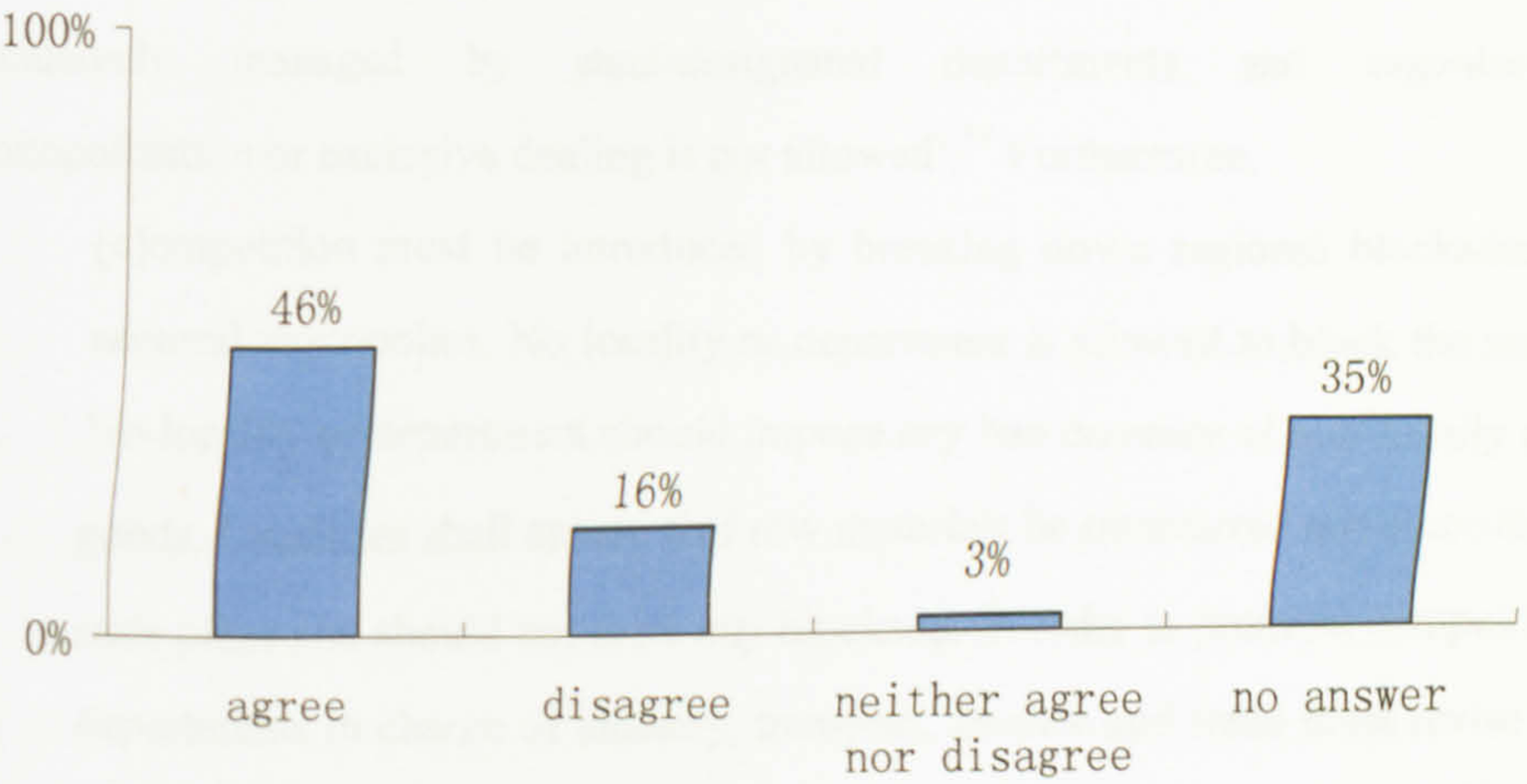
[50] Zhou Qiren, *Jingzheng, Longduan he Guanzhi – Fanlongduan Zhengce de Beijing Baogao* (Competition, Monopoly and Regulation – Background Report on Antimonopoly Policy), Internal Research Report, The Department of Industry of The State Office of Restructuring, China, 22 December 2001.

[51] *Williams* (n 13) 289.

[52] For example, Article 3.2 of Korean Monopoly Regulation and Fair Trade Act states: 'The Fair Trade Commission may give opinions to the chief officers of the appropriate administrative authorities as to the introduction of competition or other measures necessary to improve market structures, where it appears to be necessary for the Commission to carry out action plans...' Also, Article 63 states: '...The chief-officer of the competent administrative authority shall seek, in advance, consultation to the Fair Trade Commission, where he intends to propose legislation or amend enactments containing anti-competitive regulations...'.

[53] See the Appendix 2 for data explanation.



According to the survey conducted for this research in the summer of 2005, 46% of respondents researched said that they agreed with using an anti-monopoly law to deal with administrative monopoly. 16% of respondents disagreed with such an approach. 3% of respondents chose neither agree nor disagree, with further 35% of respondents chose not to answer the question. During this author's field research in 2005, a law research student in Shanghai commented that using a law to regulate the so-called 'administrative monopoly' in present Chinese context would be unfeasible and the legislators might deceive themselves as well as others. However, employees were basically more confident toward the proposed law on the issue of administrative monopoly. For example, a lay-off manager of an SOE in Zhengzhou expressed his opinions that, 'it is a good sign our leaders begin to realize the problems caused by the government itself. I look forward to seeing the new law because I think a more competitive economy may help me back to employment again.'

4.2 The Current Legal and Regulatory Framework

As discussed in 3.1.1, above, *The Interim Provisions for Promoting and Protecting Competition in the Socialist Economy* (the Ten Articles on Competition), issued by the State Council on 17 October 1980, were the first legislative document to protect

competition and regulate administrative monopoly in China.[54] The Ten Articles on Competition stipulated that 'in economic activities, with the exception of products exclusively managed by state-designated departments and organisations, monopolization or exclusive dealing is not allowed'.[55] Furthermore,

> [c]ompetition must be introduced by breaking down regional blockades and sectoral monopolies. No locality or department is allowed to block the market. No locality or department should impose any ban on entry of non-locally made goods. Localities shall ensure that raw materials be transferred out according to state plans and should not crate any blockade. In order to promote competition, departments in charge of industry, transport, finance and trade must revise any part(s) of their existing regulations and rules which impede competition.[56]

As the first legislative effort to combat monopolies and a signal of the PRC's economic transition, The Ten Articles' historical significance should not be underestimated. However, as analysed in 3.1.1, the manifested conflicts between competition policy and socialist ideology, the non-existed enforcement mechanism rendered the Ten Articles a mere paper tiger.

4.2.1 The Anti-Unfair Competition Law 1993

Article 7 of the AUCL stipulates that,

> Governments and their affiliated departments shall not abuse administrative powers to force consumers to buy commodities only from designated sellers or to impose restrictions on the business of their competitors. Governments and their affiliated departments shall not abuse administrative powers to prevent commodities originating in other regions from entering local markets or prevent local commodities from flowing into the markets of other regions.

Therefore, Article 6 of the AUCL is a rule that regulates both undertakings and administrative monopoly because it can be infringed in conjunction with Article 7 by

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[54] See 3.1.1, above.

[55] The Ten Articles on Competition, art 3.

[56] Ibid, art 6.

the administrative authorities 'hiding' behind the public utility enterprises. It states that 'Public utilities or other operators having monopolistic status according to law shall not force others to buy goods of the specific operators designated by them so as to exclude other operators form fair competition.'

4.2.2 The Provisions on Prohibiting Regional Blockades in Market Economy

The Provisions on Prohibiting Regional Blockades in Market Economy (Regional Blockades Provisions) were adopted by the State Council in April 2001. This legislative document prohibits all forms of geographic market partitioning activities. Any type of conduct by any individual or unit with the purpose of preventing the products or services of one region from entering the local markets of another or vice versa is prohibited.[57]

4.2.3 Sectoral Regulations: Some Examples

4.2.3.1 The Postal Law 1986

The Postal Law was adopted in December 1986 and entered into force in January 1987. It provides that postal enterprises affiliated to the competent department of postal services under the State Council are public enterprises, owned by the whole people. Postal enterprises shall establish branches to operate postal service.[58] It also provided that mail delivery and other service with characteristics of mail delivery shall be exclusively operated by postal enterprises, except otherwise stipulated by the State Council. Postal enterprises may entrust other units or individuals as agencies to run businesses exclusively operated by postal enterprises.[59] The State Post Bureau (SPB) and the SAIC are agencies to supervise and administer the postal law and postal service in the PRC.

4.2.3.2 The Electric Power Law 1995

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[57] The Regional Blockades Provisions, arts 6-9.

[58] Postal Law, art 3.

[59] Ibid, art 8.

The Electric Power Law was adopted in December 1995 and entered into force in April 1996. It states that the state encourages domestic and foreign investment in the electric industry.[60] It further provides that electric power supplying enterprises are required to operate in their approved supplying area.[61] Furthermore, the principle of 'unified pricing policy managed by relevant regulators at different levels' must be followed. No unit may set the electricity price beyond its authority over electricity price control. No power-supplying enterprise may change the electricity price without authorization.[62] The State Electricity Regulatory Commission (SERC) and electricity departments above county level are agencies to supervise and administer the electric power industry in the PRC.

4.2.3.3 The Railway Law 1990

The Railway Law was adopted in September 1990 and entered into force in May 1991. It provides that the Ministry of Railways (MOR) shall be responsible for railway industry throughout the country and implement a highly centralized transport control system over the national railway network. The MOR shall be responsible for setting railway fares and tariffs.[63]

4.2.3.4 The Telecommunications Regulations 2000

The Telecommunications Regulations were adopted and effective as of September 2000. The Telecommunications Regulations provide that 'supervision and administration of the telecommunications industry shall be in accordance with the principles of separating governmental functions from enterprise management, prohibiting monopoly, encouraging competition, and facilitating development, openness, equality and fairness.'[64] Licensing system is established based on the recognition of differences between basic telecommunications service and value-added

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[60] Electric Power Law, art 3.

[61] Ibid, art 25.

[62] Ibid, arts 35 and 43.

[63] Railway Law, arts 6 and 72.

[64] Telecommunications Regulations, art 4.

service.[65] Major telecommunications enterprises are prohibited from refusing requests for connecting to the telecommunication network.[66] Customers have rights to choose service suppliers. [67] Forced transactions are therefore prohibited. Furthermore, restrictive practices such as predatory pricing and irrational cross-subsidies are also prohibited. [68] The Ministry of Information Industry (MII) and departments of information industry at provincial levels are agencies to supervise and administer the telecommunications industry.

4.3 Abuse of Administrative Powers to Eliminate or Restrict Competition under the Anti-Monopoly Law 2007

The AML incorporates an entire chapter to regulate abuse of administrative power to eliminate or restrict competition. It prohibits administrative agencies and 'organisations empowered by laws or regulations with responsibilities for public affairs administration' (other public organizations) from abusing their administrative powers to participate in forced transactions, regional blockades, or to promulgate anti-competition rules.[69]

(1) **Sectoral monopoly:** Administrative agencies and other public organisations are prohibited from abusing their administrative power to compel undertakings to engage in the monopolistic conduct prohibited by the AML.[70]

(2) **Regional blockade:** Government agencies and other public organisations are prohibited from abusing administrative power to take a series of actions that impede the free flow of products between different regions. Specifically outlawed actions include, for example, setting up discriminatory standards for fees,

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[65] Ibid, arts 7, 8, and 12.

[66] Ibid, arts 17-22.

[67] Ibid, arts 31.

[68] Ibid, arts 42.

[69] AML, ch 5, arts 32 – 37.

[70] AML, art 36.

technical requirements, and licensing, and setting up checkpoints, restricting non-local undertakings from bidding activities, etc.[71]

(3) **Forced transactions:** Administrative agencies and other public organisations are prohibited from abusing administrative power to mandate (or mandate in disguise) any entities or persons to operate, purchase or use only the products supplied by designated undertakings.[72]

(4) **Administrative conduct with general application:** Administrative agencies are prohibited from abusing administrative power to promulgating rules containing provisions which eliminate or restrict competition. [73]

Remedies provided by the AML on abuse of administrative power to eliminate or restrict competition include: the superior agency of the administrative agency or of the public organisation shall order it to make correction; the persons directly in charge and others directly responsible shall be subject to disciplinary sanctions in accordance with law. Furthermore, the AMEA may make proposals to the relevant superior agency to handle the case in accordance with law.[74]

Previous drafts however provided more efficient remedies, including, revoking specific administrative acts, administrative sanctions to the directly responsible officials, referring to criminal procedure if the administrative act in question constitutes a criminal offence, and confiscating the illegal income and imposing a fine of up to RMB 1,000,000 to the designated undertaking according to the seriousness of circumstances, and, the AMEA to suggest or advise the administrative agencies

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[71] Ibid. arts 33 and 34.

[72] Ibid. art 32.

[73] Ibid, art 37. 'Administrative conduct with general application' and related remedy 'suggesting or advising ....to change or revoke such conduct' were once deleted by the July 2005 Draft. This writer's opinion is that it was understandable to omit such provisions without carefully designed remedies and workable enforcement mechanism. However, the problems caused by 'administrative conduct with general application' cannot be evaded by simply leave them free from scrutiny.

[74] AML, art 51.

promulgating rules with provisions eliminating or restricting competition to change or revoke the rules.[75]

It is not certain whether there will be remedies available to compensate victims of abuse of administrative power to eliminate or restrict competition at the time of writing. One could expect that although complainants could bring actions after 1 August 2008 when the AML will come into force, for example, based on similar disputes to the *Yongchun* case, they would still be in an unfavourable position because of the law's inadequate design on remedies.

The wide scope and apparent strict rules but insufficient enforcement mechanism prohibiting abuse of administrative powers to eliminate or restrict competition have revealed China's governance crisis as a transitional economy. Although the government is urged to regulate the economy by enforcing and complying with the law, there are no functioning mechanisms to offer necessary constraints or incentives. Without a genuine reform to decentralise political power, old institutions and mentalities will continue to encourage rent-seeking behaviour by turning administrative powers into a profitable resource. Government agencies are only subject to self-discipline with little accountability under the Administrative Litigation Law 1989, and there are no rigorous external constraints, such as effective judicial review, have been developed.[76] As a result, effective competition has been smothered by suppressive and irregular government practices. In this sense, the incorporation of rules on abuse of administrative power is primarily to create and preserve the basic conditions for a competitive market order. Similar conditions and problems in other transitional economies have produced the same type of competition law provisions to prevent state bodies from taking actions harmful to competition in marketplace.[77]

For instance, the recently adopted Vietnam's Competition Law has provisions specially

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[75] See, for example, the July 2004 Draft, arts 59 and 60.

[76] The topic of the relationship between judicial review and competition law is dealt with in ch 8 below.

[77] Roger Alan Boner, 'Antitrust and State Action in Transition Economies', *Antitrust Bulletin*, Spring 1998.

designed for state monopoly sectors.[78] In Russia, the Law on Competition and Limitation of Monopolistic Activity on Commodity Markets was adopted in 1991 and amended in 1995. The main feature of Russian competition law is that it is applied not only to undertakings but also to State executive authorities. According to Article 7 & 8 of the Law, actions and agreements of the bodies of executive authority that limit the economic independence of undertakings, create favourable or discriminatory conditions for certain undertakings shall be prohibited. The 1995 amendment to Article 7 of the Law further gives the anti-monopoly authority power of preliminary control over adoption of decisions of executive authorities. In addition, decisions on questions of establishing, reorganization and liquidation of undertakings as well as on granting any privileges to a certain undertakings or group of undertakings shall be approved by the anti-monopoly authority.[79]

A further example is Bulgaria, where, in addition to regulating undertakings, Article 2 of 1998 Bulgarian Law on Competition Protection stipulates the Law shall also apply to 'the authorities of the executive branch and of local government, if they expressly or tacitly prevent, restrict, distort or might prevent, restrict or distort the competition in the country'. The 2003 amendment, followed the EC model of Article 86, further the Law's scope to 'undertakings to whom the state or the local authorities has assigned services of public interest in so far as the application of the law does not impede *de facto* or *de jure* the fulfillment of the tasks assigned to these enterprises and the competition in the country is not affected to a considerable extent'.[80]

Not only the transitional countries, advanced economies, such as the EC, also have a sophisticated system to deal with exclusive rights and state monopolies through a series of legislative, judicial, and administrative instruments. However, as far as the

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[78] See, for example, Vietnam – new competition law, Freshfields Bruckhaus Deringer Updates, January 2005; and, Le Phu Cuong, 'Monopoly Situation in Vietnam', at: <http://www2.jftc.go.jp/eacpf/05/APECTrainingProgram2003/LePCuong.pdf>.

[79] B. Kashevarov and Andrei.G. Tsyganov, *Summary of the most Important Recent Developments in Russian Competition Legislation*, <http://europa.eu.int/comm/competition/speeches/text/sp1996_040_en.html>.

[80] See the Bulgarian *Law on Competition Protection*, at <http://www.cpc.bg/system/storage/zak_en_1_119.doc>.

present writer knows, only China chose to use the concept of 'administrative monopoly'. Such concept as well as related provisions has become a major dilemma of the AML and had caused its enactment blocked several times. The prohibition of 'administrative monopoly' might be a special endeavour which is planed to assure the transition to a market economy. The provisions, however, deliver serious enforcement challenges for Chinese authorities and courts. One might ask how could the provisions to be applied to government agencies of various sectors and levels. Although it still remains to be seen whether the remedies could be further improved and effectively implemented by the AMEA against other government agencies in the future, one can reasonably predict the outcome maybe passive considering the unbalanced social and political context for these provisions to be functioning in China.

4.4 Case Study 1: the *Yongchun* Case[81]

In 4.4 and 4.5, case study on the Yonchun Case, in particular, and in sectoral monopoly and regional blockades, in general, shed further light on the difficulties of prohibiting abuse of administrative power to restrict competition under the current political equilibrium.

4.4.1 The Facts

On 27 May 1994, Jiangdu Education Department[82] (JED) issued *the Circular on Standard Registration Photos for Middle School Students* (hereinafter referred to as 'the Circular'). The Circular demanded that, from 1994 onwards, all newly registered 1st year middle school students of Jiangdu were required to take standard registration photos, which meant same size, same colour, and taken against same background (indicating 'yy JIANG JIAO'[83]). In the Circular, the JED authorized Jiangdu Education

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[81] *Yongchun and others v Jiangdu Education Department (JED) and Jiangdu Education Industrial Company (JEIC)* Adapted and translated by this writer from: China Senior Judges Training Center and The People's University Law School, *Review of Cases of Chinese Courts* (The People's University Press, Beijing 1997) 450-453.
(1) All footnotes were added by this author.
(2) No case citation is available at the time of writing.

[82] Jiangdu is a county of Yangzhou city in Jiangsu province of the PRC.

[83] 'yy' referred to the year of first registration. 'JIANG JAO' was the abbreviation of 'Jiangdu Jaoyuju' (Jiangdu Education Department). For example, all registration photos for 1994-1995 academic year thus had '94 JIANG

Industrial Company (JEIC) working on the JED's behalf to offer door-to-door photo taking services for each school. The JEIC then arranged a photo-taking timetable and handed it out to local schools. Before complaints have arisen, the JEIC charged RMB 4.95 per set, and took photos for approximately 10,000 students of 40 schools. The net profit was RMB 20,000. When answering complaints from students and local photo studios, the staff of the JED and the JEIC emphasized that without photos meeting the standard set by the Circular, registration cards could not be issued. Local photo studios then referred the matter to Jiangdu Administration of Industry and Commerce and Jiangdu People's Congress and asked the JED revoke the Circular. However, the complaints and claims were left unresolved.

In November 1994, Yongchun Photo Studio and other 37 local photo studios brought an action against the JED and the JEIC at the County People's Court of Jiangdu (CCJ). Yongchun and others argued that the Circular infringed Article 7 of the AUCL[84] and claimed that the JED and JEIC should cease the infringement, express an apology, and compensate for the damages.

The CCJ found that the JEIC was incorporated by the JED as a subsidiary unit. According to an agreement between the JED and the JEIC, the former should give 'convenience' to the latter and should help it to acquire business as more as possible within 'the JED's system' (meaning the JED, its subsidiaries, and local schools). The JEIC was required to share its profits with the JED according to a fixed percentage. In addition, the JED granted an exclusive right to the JEIC for using 'yy JIANG JAO' as 'background' for registration photos. The JED never expressed that local photo studios could use such 'background' to offer services on school registration photos.

4.4.2 The Judgement

JAO' on the background.

[84] Article 7 (1) of the AUCL provides 'Governments and their affiliated departments shall not abuse administrative powers to force consumers to buy commodities only from designated sellers or to impose restrictions on the business of their competitors'. For detailed review of the AUCL 1993, see 3.1.2 above.

The CCJ found, by using administrative power, the JED reserved the services of school registration photos exclusively to its subsidiary, the JEIC, and by so doing, eliminated all local photo studios from the market of 'school registration photos'.[85] The JED's practice infringed Article 7(1) of the AUCL, and therefore constituted unfair competition behaviour.

However, the CCJ went on to decide, according to Article 30 of the AUCL[86], the unfair competition behaviour of the JED should be terminated or corrected by the People's government of the same level or educational authority of the higher level, in this case, the People's Government of Jiangdu, or the Education Department of Yangzhou. The CCJ has therefore no jurisdiction on this dispute. The action was dismissed.

Yongchun and others appealed to the Intermediate People's Court of Yangzhou (ICY). The ICY held, according to Article 30 of the AUCL, whether the disputed circular issuing practice of the JED was unfair competition behaviour should be decided by the competent administrative organ(s), and therefore outside the jurisdiction of the People's Courts. Furthermore, the exclusive practice of the JEIC is based on the Circular. Also according to Article 30 of the AUCL, whether there is compensation should be settled after the competent administrative organ(s)' decision towards the dispute.[87] The ICY therefore upheld the CCJ's finding and dismissed the appeal. The judgment was final.[88]

4.4.3 A Comment

The facts of the *Yongchun* case, which involved a restrictive practice of forced

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[85] The concept of 'relevant market', 'given market', or 'specific market' could not been found among Chinese legislation, case law, and literatures in 1994.

[86] Article 30 of AUCL 1993 states that '[w]here a local government and it subordinate departments, in contravention to the provisions of Article 7 of this law, ... the administrative authorities at higher level shall order them to rectify the situation; where the circumstances are serious, the competent authorities at the same level or the next higher level shall take disciplinary sanctions against the persons directly responsible.'

[87] The ICY left unanswered who should decide the question of compensation.

[88] According to the principle of 'four Levels, two Instances', the PRC court system has four levels and the judgment of the court of first instance may be appealed to the court of next higher level, but the judgments of the second instance are final.

transactions, were among typical categories of 'administrative monopoly' in China. The judgement revealed serious flaws in enforcement mechanism and institutional arrangement of the AUCL, the first Chinese law incorporating provisions dealing with administrative monopoly.[89] The case also reflected the *status quo* of the power relationships between the administrative and judiciary systems in the PRC.[90]

4.5 Case Study 2: More Examples of Using (Abusing) Administrative Power to Restrict Competition

4.5.1 Sectoral Monopoly: Excessive Pricing, Tying, Entry Deterrence, and other Restrictive Practices

After four rounds of government restructuring, sectoral monopoly now is found in a limited number of industries, which includes, among other things, natural monopolies and certain key technology enterprises such as space and nuclear technology.[91] Also referred to as industry or department monopoly, sectoral monopoly, is mainly manifested as restrictive and/or monopolistic behaviour of public utilities and other network industry. The logical link between sectoral monopoly and network industry is that, in contemporary China, the later are historically established by or controlled by sector regulators. For example, in electricity industry, there is an established principle of: 'One County, One Electricity Administration, and One Company'.[92]

The ministries and their subsidiaries operating or regulating those industries, however, have been widely criticized for using regulatory power to unduly restrict competition. For instance, in early 1999, when its affiliated airlines started to decrease airfare, the China General Administration of Civil Aviation (CAAC) imposed a ban on thicket

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[89] Before the AUCL, there were several administrative regulations with provisions dealing with administrative monopoly. See 5.1 of the present chapter for an example.

[90] See ch 2, above.

[91] See discussion in 2.3, above.

[92] The 'one company' is in principle, established as a subsidiary undertaking of the 'one administration'. But the administration of some county, without establishing such a company, directly carries out economic activities of electricity distribution. See, *Qi* (n 40) 255-260.

discounts.[93] The most criticized sectoral monopoly phenomena are monopolistic behaviour in the educational sector, and restrictive practices prevailing in natural monopolies such as railway industry, postal services, and other utilities industry.[94]

4.5.1.1 The Educational Sector

Higher education institutions in the PRC began to charge tuition fees in 1989. By 2004, the average revenue of residents in cities and towns has increased four times, but the average college tuition fees have increased twenty five times.[95] Meanwhile, the relevant regulators have set different kinds of barriers to entry and discrimination against private colleges and universities, which have left private schools to unprivileged position and thus can only compete with government-funded institutions marginally. In fact, as criticised by some commentators, there is no 'education industrialisation' in the sense of market economy as advocate by the government, but only sectoral monopoly under the flag of 'education industrialisation', which has been believed as a major reason for excessive fees.[96]

From the survey conducted for this research, more than 80% of people expressed their concern and dissatisfaction toward the excessive fees, low quality, rigid system, and out-of-date curricula of Chinese educational system both in higher and foundational education.

Figure 4.2 Respondents who agree they cannot afford their education[97]

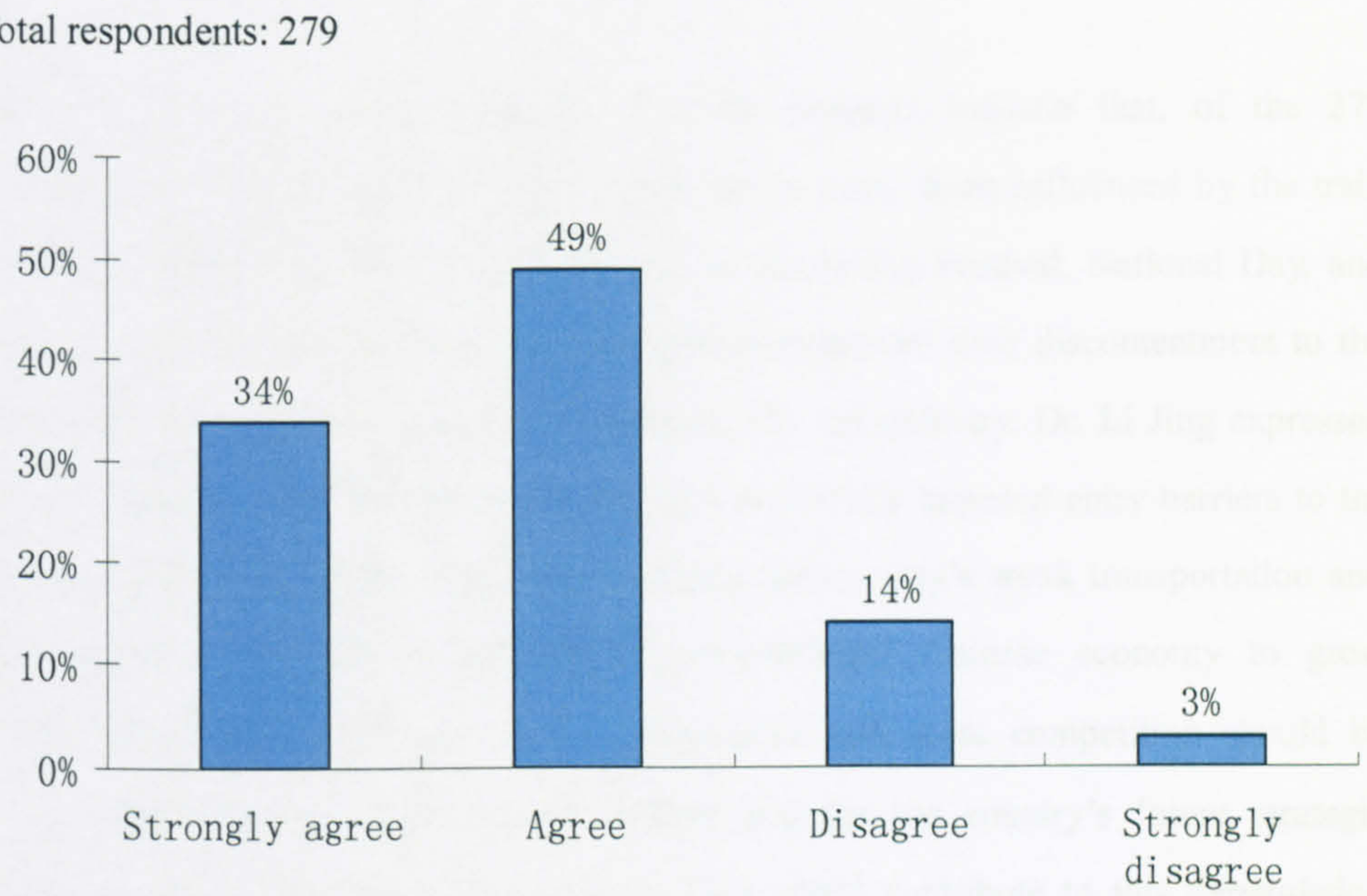
[93] Official Notice from State Planning Commission and China Civil Aviation Bureau on Strengthening the Administration of Domestic Airfare to Ban Low Price Competition (25 January 1999).

[94] However, not all monopolistic behaviour of network enterprises and other undertakings can be categorized as administrative monopoly. They are simply behaviour of undertakings and ought to be dealt by referring to provisions of restrictive agreements and of abuse of dominance. Detailed analysis see chs 5 and 6.

[95] Zhongguo Xinwen Zhoukan, (China Weekly News) (Beijing 11 April 2004) 10.

[96] See for example, Wang Xianqing, *Chinese Education – the Biggest Victim of Monopoly*, at: <http://www.blogms.com/blog/CommList.aspx?BloglogCode=1000004532>; Zhou Liang, *Where are the roots of corruption in education?* <http://www.chinaeweekly.com/viewarticle_gb.aspx?vid=1065>.

[97] See the Appendix 2 for data explanation.



4.5.1.2 The Railway Industry

Railway transport in the PRC is mostly controlled by the Ministry of Railways (MOR). Every year, there are special fares (15%-20% increase in two weeks) during the traditional Chinese's New Year – the Spring Festival, which is seen as an occasion for family reunion in China, and some other public holidays. There was only one 'Public Hearing' held in 2001 regarding the special fares, which functioned like a political show. In 2005, the official explanation was that 'the increasing extent of the railway fares during the 2005 Chinese New Year would be the same as the previous New Year seasons' (so there is no need to have a hearing). Altogether 137 million people were estimated to take trains during the 2005 Spring Festival.[98] The Spring Festival now is called 'Spring Plunder' by Chinese.[99] Ironical comments, such as 'the Ministry's only one public hearing would be valid for one hundred years', have prevailed on the Internet and other media[100].

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[98] Xinhua News Agency (Beijing 13 November 2005).

[99] 'Festival' and 'plunder' have same pronunciation as [jie] in Mandarin.

[100] See, for example, *The Ministry of Railways: Nostalgia for the past; The Committee of the Development and Reform: Misrepresentation of the Present*, by Wang Xudong, at, <http://news.xinhuanet.com/comments/2005-01/16/content_2459666.htm>; for more comments see, <http://comments.xinhuanet.com/comment?newsid=2448265>.

Results form the survey conducted for this research indicate that, of the 279 respondents, 92% agreed they and/or their family have been influenced by the train fare increases during public holidays such as the Spring Festival, National Day, and May Day holidays. 46% of respondents further expressed their discontentment to the high price and insufficient service offered by the rail industry. Dr. Li Jing expressed her concerns towards the sector at issue, 'the artificially imposed entry barriers to the transport industry are too high, which caused the country's weak transportation and distribution infrastructures and therefore constrained Chinese economy to grow organically. The industry has to be deregulated and more competition should be brought in both for the consumer welfare and for the country's future strategic development. I hope the Anti-Monopoly Law could contribute to this deregulation process in the near future.'[101]

4.5.1.3 The Postal Service

89% of respondents agreed that when they post letters and packages, the post office only accepted those with envelopes and packing materials meeting the standards set by the China Post, which actually refer to envelopes produced by affiliated undertakings of 'China Post' and packing materials sold by 'China Post'. Here is a little anecdote by Professor Tao Zhenhua, '[t]his letter was returned by the post office recently because I used an envelope which didn't match the new standard. But this envelope was produced by a subsidiary of the post office according to its old standard. I doubt there is any objective reason to set a standard for envelope and then change it irregular. In any case, the post office should recall all old envelopes and give us refund. Of course it never does so.'[102] In many areas, consumers are required to accept other services by

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[101] Statement made at an interview during this author's field research on China's competition law legislation in Beijing, May and June 2005. The project was funded by University of London Central Research Fund (CRF) (Reference No. AR/CRF/C). Dr. Li Jing, lecturer in economics at the Capital University of Economy and Trade, Beijing.

[102] Comment made by oral communication during this writer's field research in Beijing in 2005. Tao ZhengHua, Professor of international law at the Institute of Law of Chinese Academy of Social Sciences (CASS), Beijing.

certain providers.[103] For example, in Hubei province, the postal office required customers to open saving account with them. In Jiangsu province, the postal office required customers to use debit card service from a specific bank.[104]

4.5.1.4 Other Typical Monopolistic Conduct in the Public Utilities

78% of respondents agreed that they and/or their household had been charged with excessive fees under the name of 'first time installing fees', 'connecting fees', etc. when they began to use telephone, gas, tap water, electricity, and heating, etc[105]. 'Excessive fees' in the Chinese context means the fee is over charged compared with the average income of ordinary citizens. For example, during the author's field research in China, an accountant of a private-owned enterprise in Zhengzhou complained that, 'in 2004, the gas company charged every household in this new residential area RMB 3,000 for connecting to the gas pipe, which was equally to one eighth of my family's annual income. We are in the middle income level of this city. In 2005, the electricity company charged every household RMB 1,000 of the city for electricity meter upgrading...Most citizens struggle to pay a variety of exorbitant fees.'

Public Utilities normally use official documents, such as circulars, to justify their restrictive behaviour. For example, in 1999, a power department in Jiangsu province required users to buy electric product it provided, based on an official circular issued by the Ministry of Electricity.[106]

4.5.2 Regional Blockades: Market Foreclosure and Partitioning

A study conducted by Sandra Poncet, an economist at the Centre for International Research and Development in Paris, has showed that regional trade barriers within the

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[103] SAIC Gazette (1999) 278; also see Beijing Evening Post 05 June 2005.

[104] SAIC Gazette (1999) 132.

[105] Public utilities were tightly control by Chinese government, mainly by specific ministries. The government began to reform public utilities slowly and hesitatingly, for example, to accept competition in telecommunication industry. At the time of writing, however, there are still no sign when the government will begin to reform the retailing of gas and electricity.

[106] SAIC Gazette (1999) 275.

PRC are as high as those between countries of the European Union in the late 1990s, and is also roughly the same as the trade barriers between Canada and the USA. Inter-provincial trade barriers have risen steadily since the 1980s as Poncet found goods crossing provincial borders in China faced the equivalent of a 46% tariff in 1997, up from 35% a decade earlier.[107]

Examples of regional blockades, also referred as local protectionism, are familiar to most Chinese. In Jilin and Hebei provinces, regional governments once required non-local beer manufacturers to contribute to a 'beer adjustments fund' and in effect imposed an additional fee on each bottle of beer sold in the local market.[108] A local government in the Northeast was reported to have issued an official circular requiring all local retailers to sell only locally manufactured fertilizers. Any violation would result in confiscation of the 'illegal goods', punitive fines and even revocation of the business licences. At local levels, the administrative departments often condition issuance of approvals or licenses on acceptance of designated services. For example, department of motor vehicles may require vehicle owners to use designated garages from maintenance services in order to obtain or renew licenses.

4.5.3 Forced Transactions

Forced transaction can be a reflection of both sectoral monopoly and regional blockades. However certain forced transaction cannot be defined in the two categories. For example, during the present writer's field research in Beijing, more than two third (69%) of the respondents agreed that when issued with ID cards, passports, marriage certificates, even academic credentials, etc. they have been required to have their photos to be taken at designated place and pay higher price. Photos taken at other place would be rejected by the issuing authorities. Stories similar to the *Yongchun* case still happen everyday and related authorities have taken such 'power' for granted. A

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[107] See Bruce Gilley, 'Provincial disintegration: reaching your market is more than just a matter of distance' *Far Eastern Economic Review* (22 November 2001) 44.

[108] Wu Chengguang, 'Difficulties in Combating Monopolies' May 2001, <http://finance.sina.com.cn/o/59830.html>.

lecturer in Sociology aired his grievance as a citizen, 'People don't understand why they have to pay more if they could get something cheaper and better elsewhere? Some of the powerful is trying to extort every cent from the general public.'[109]

4.6 Concluding Remarks: Reform Requirements

After detailed examination, one can expect that the logical outcome of adopting the concept of 'administrative monopoly', or 'abuse of administrative powers to eliminate or restrict competition', which overlaps with several related concepts, has caused and will continually cause difficulties in interpretation and application.

'Administrative monopoly' also unnecessarily narrows the law's scope to deal with restrictive behaviour caused by public authorities, for example, legislative and/or quasi-legislative measures which restrict or distort competition. The former is the exercise of legislative power and is therefore out of the scope of 'administrative monopoly'. The latter, quasi-legislative measures, although is undeniably a form of the exercise of executive (administrative power) power, is potentially out of the scope of 'administrative monopoly' because of the unavoidable conflicts of the teeming regulations and the AML and the inability of the competition authority to deal with such conflicts under the present institutional framework. This is one reason why quasi-legislative measures, expressed as 'administrative conduct with general application' was deleted from the previous draft.

It is hereby submitted that:

(1) The concept of 'administrative monopoly' should be abolished because of the innate obscurity, uncertainty, and limitation of the concept. One solution is to substitute 'state monopolies' or 'restricting competition by using state measures/public authority' for 'administrative monopoly'.

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[109] Comment given by an anonymous lecturer in sociology during the author's same field research in Xi'an, China. See n 99, above, for details.

The title of Chapter V of the AML may thus be revised from 'Abuse of Administrative Power to Eliminate or Restrict Competition' to 'Provisions Addressed to State Monopolies', or 'Provisions Addressed to Restricting Competition by Using State Measures/Public Authority', or to a more concise title of 'Provisions Addressed to Public Authorities'.[110]

(2) Constitutional prohibitions on restrictive behaviour by public authorities without objective justification and respect to the principle of proportionality; Adding provisions concerning competition in future constitution amendment as 'basic norms' in the hierarchy of Chinese laws.

(3) Further transplanting the EC 'principle of proportionality' and the jurisprudence behind such principle in future Constitution amendment and administrative legislation in general, and in competition legislation in particular.

The EC principle of proportionality was originated from German law and has three subsidiary principles: suitability, necessity and proportionality 'strictly speaking'. In Case C-331/88 *Fedesa* (1990), the ECJ defined proportionality as: 'The principle of proportionality ... requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused are not to be disproportionate to the aims pursued.' Although originally addressed to Community institutions in relation to the Community principle of subsidiarity, the principle has been used to challenge both Community action and member state actions.[111] The present author predicts that the philosophy behind the principle and case law and decisions developed by the ECJ, CFI, and the EC

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[110] Before the July 2005 draft, the previous drafts all chose the title of 'Prohibition of Administrative Monopoly'. The July 2005 draft adapted the title to 'Prohibition on Abuse of Administrative Power to Restrict Competition'.

[111] See for example, Commission Decision (EEC) 90/16 concerning the provision in the Netherlands of express delivery services (Courier Postal Service – The Netherlands) [1990] OJ L10/51, paras 16-18.

Commission are highly relevant and could be carefully transplanted to Chinese context.

At the time of writing, no provisions of the current Chinese laws and regulations explicitly incorporate the principle of proportionality. However, many Chinese academic works argue that the principle of proportionality was adopted implicitly in the Chinese administrative law.[112] For example, according to the Administrative Litigation Law 1989 (ALL 1989), a specific administrative action may be revoked, partially revoked, or modified by the people's courts if a specific administrative action is through an incorrect application of laws or rules, the defendant administrative organ abuses its power, or, the imposed administrative penalties are clearly unjust.[113] However, this writer's research indicate that the principle of proportionality is seldom to be interpreted, articulated, or applied in China due to the early stage of development of Chinese administrative law, which is also the major obstacle of transplanting the principle of proportionality in China.

The system research of administrative law only started in China in the early 1980s. Legal scholars in this field have been heavily influenced both by the orthodox Marxist approach of law and by Western legal theories. There is so far no definitively or unanimously accepted definition of administrative law in China. Until quite recently, the debate on administrative law in China has been mainly focused on whether the law should be used to protect or restrain administrative organs to exercise administrative power. One set of scholars argues that the origin of modern administrative law is from Western countries and is based on the constitutional principles of rule of law and separation of powers. The second school argues that Chinese administrative law is based on a socialist political structure, which is therefore fundamentally different with 'Western bourgeois administrative law' in essence. The third school represents a more commonly accepted approach, which argues that Chinese administrative law should

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[112] Mingan Jiang, *Administrative Law and Administrative Litigation Law* (2nd edn, Peking University Press and Higher Education Press, Beijing 2005) 71.

[113] ALL 1989, art 54.

protect and control the exercise of administrative power.[114] Like any intellectual construct, the principle of proportionality is particularized rather than being a universal norm that can be readily transplanted to other social systems. Due to the unclear definition, objectives and rationales, and development status quo of Chinese administrative law, the process of transplanting the principle of proportionality in China will certainly take long time to complete.

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(4) Reinforcing the judicial power in China by establishing the mechanism of effective judicial review, and by so doing, to guarantee the constitutionality of laws and delegated legislations,[115] furthermore, improving judiciary control of administration in order to examine effectively the legality of administrative acts, both substantively and procedurally.

(5) Transplanting the EC concepts of 'state monopolies of a commercial character', 'service of general economic interest', and the principle of 'conflicts of interests' in competition legislation.

(6) Distinguishing between monopolies de facto and potentially competitive economic activities. Taking electricity industry for example, the supply of electricity contains four successive production states: generation, high-voltage transmission, low-voltage distribution and retailing. Transmission and distribution are network industry that are monopolies de facto and can still be justified under the theory of natural monopoly considering the status quo of technical development. By contrary, Electricity generation and retailing are potentially competitive and should be open to competition.[116] Another example is basic postal services and value-added cruise

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[114] Songnian Ying, *Xingzhengfaxue Xinlun* (New Theory of Administrative Law) (China Fazheng Press, Beijing 1997) 7.

[115] Although *detailed* analysis of present concentrated state and the possibility of a 'separation of powers' in China are beyond the scope and objectives of this thesis and might only permit an historical explanation, a review of political conditions for Chinese competition law and policy is provided in ch 2, above.

[116] Gert Brunekreeft and Katja Keller, 'Competition in European Electricity Supply: Issues and Obstacles' in Johann Eekhoff (eds) *Competition Policy in Europe* (Springer, Verlag 2004) 193. Chinese economists also have common understanding on this issue. See, for example, *Qi* (n 40) 280-282.

services.[117]

(7) Establishing connection between other substantive competition provisions and state monopolies/ restricting competition by using state measures (public authority): Neither the AML nor the available literature has clarified the question of whether the provisions on administrative monopoly has any connection with other substantive provisions and if yes, how the connection should be established and to be dealt with in practice. For reasons of legal certainty, this author suggests that it is necessary to adopt a reasonable interpretation in the near future.

To prohibit the abuse of administrative power to restrict competition, a system of legal, economic and political instruments is required. Neither legal nor non-legal approaches alone are sufficient. Without being sustained by an independent judiciary and a competent quasi-judiciary competition authority, using administrative power to check administrative power may be unfeasible. Although it is an imperative pillar of the system, the AML is far from adequate and is not a panacea. The AML is especially vulnerable on scrutinizing public authorities when taking into account its remedy design, institutional arrangement, and its context. That is one reason why 'administrative monopoly' has become the most formidable dilemma and battlefield of competition legislation in China.

This writer's cautious conclusion is as below. First of all, as observed by James Madison in 1788, 'in framing a government to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.' Without being sustained by an independent judiciary and a competent quasi-judiciary competition authority, using administrative power to check administrative power will be too unrealistic and too uncertain to be achieved. Secondly, bearing the above observation in mind, further in-depth multi-jurisdictional comparative research, especially investigation into state

[117] Case C-320/91 *Corbeau* [1993] ECR I-2533.

monopolies under the EC law, could nevertheless provide potentially adaptable solutions for a transitional China.

This chapter is closed by a little story. Ming Tai Zu (1368 – 1399 A.D.), the first Emperor of the Ming Dynasty, once asked, 'I am determined to eliminate corruption. But why people offended the law at the end of the day after I just executed many corrupted officials in the morning?' Liang Zhiping, a contemporary Chinese jurist, submitted an explanation to the king. Liang commented that criminal penalty may punish the outcome of the crime, yet it cannot eliminate the incentives of the crime. What Ming Tai Zu had tried to eliminate was exactly the side product of a system he had tried to protect.[118] The challenges, dilemmas and implications of the rules on use and/or abuse of administrative power to eliminate or restrict competition are worth to be closely observed and therefore open to further explanation.

[118] Liang Zhiping, 'Shuo Zhi' (On Governance), in Liang Zhiping, *Fa Bian* (The Law's Evolution) (China University of Politics and Law Publishing, Beijing 2002) 117-18.

5

Restrictive Agreements

This chapter examines the current legal and regulatory framework on restrictive agreements including basic concepts and mechanism established by the AML. The chapter further observes that the rationales of Chinese legislators to adopt an EC model of 'prohibition and exemption' instead of a US model of 'per se rule and rule of reason' are based on legal and institutional conditions, as well as administrability of the AML.

Furthermore, the chapter argues that because mandatory notifications for obtaining exemptions (chosen by early drafts) was not finally adopted by the AML, principles of self assessment and directly applicability are implicitly introduced into the PRC. However, since the current rules on restrictive agreements are insufficiently precise and its enforceability is subject to doubt, the statutory language calls for revisions on several aspects. It is therefore proposed that a clearer and more predictable analytical framework is needed by adopting block exemption regulations as well as necessary guidelines and notices to 'define and structure discretion' and to effectively implement the prohibition and exemptions on restrictive agreements under the AML.[1]

5.1 Background

Restrictive agreements, especially cartel activities, have been widely reported in the media over the years and have been growing in frequency and influence. Vertical restraints in China are also widespread, especially in consumer products market. For example, in July 2002, Changhong, the biggest consumer electronics producer in China, announced its termination of supplying TV sets to Beijing outlets of Guomei (now GOME), a big electronics retailer because of Guomei's pursuit of an aggressive

[1] Maher M Dabbah, *the Internationalisation of Antitrust Policy* (Cambridge University Press, Cambridge 2003) 70-85. Dabbah analyses and proposes three approaches to deal with the use of discretion by competition law authorities, namely 'confining, structuring, and checking discretion'. Among them 'confining and structuring discretion' has particular significance to the process of transplanting competition rules in the PRC.

pricing policy below certain level without consents from Changhong.[2] Whether there was a minimum RPM agreement behind such a dealership termination was uncertain since the case was left unattended with no prescriptive rules existing at all in 2002. The case however implied the needs for the PRC to adopt economic-based rules on vertical restraints.

5.2 The Current Legal and Regulatory Framework

The current legal and regulatory framework on restrictive agreements is not as stretching as those on abuse of dominant market position and on merger control. A general review is offered below.

5.2.1 The Anti-Unfair Competition Law 1993 on Bid Rigging

As discussed at 3.1 and 3.2 above, the AUCL is not solely an unfair competition law but includes substantial provisions tackling restrictive and abusive behaviour. Regarding restrictive agreements, the AUCL 1993 explicitly prohibits bid rigging. Collusive bids are void and parties are subject to a fine between RMB 10,000 and RMB 200,000.[3] Other typical restrictive agreements are however beyond the scope of the AUCL 1993.

5.2.2 The Price Law 1997 on Abusive Pricing Behaviour

The Price Law was adopted at the 29th Session of the 8th SCNPC on 29 December 1997 and entered into force on 1 May 1998. It provides that pricing system of the PRC includes market price, government-guided price and government-set price. The Price Law declares that the state promotes fair, open and lawful market competition and prohibits business operators from collusion to control market price. It also prohibits certain abusive pricing behaviour.[4] Offenders are subject to seizure of illegal gains, a fine up to five times of the illegal gains, warning, order to stop business for

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[2] —, 'Changhong tingzhi gongying Guomei' (Changhong to stop supply GOME) *Renmin Ribao* (People's Daily) (Beijing, 31 July 2000).

[3] AUCL 1993, arts 15 and 27.

[4] See 6.2.2, below.

rectification, and/or cancelling business licences.[5]

5.2.3 The Bidding Law 1999

The Bidding Law was adopted at the 11th Session of the 9th SCNPC on 30 August 1999 and entered into force on 1 January 2000. The bidding law prohibits bid rigging but provides more serious penalties than the AUCL. Offenders are subject to seizure of illegal gains, a fine equal to 5‰ to 10‰ of the total value of the bid project, disqualification to attend future bidding, cancelling business licences, criminal liabilities, and/or compensations to other parties.[6] As one could see, uncertainty and overlap exist between rules on bid rigging provided by the Bidding Law and the AUCL.

5.2.4 The Contract Law 1999 on Collusive Contracts and Contracts Monopolizing Technology

The Contract Law was adopted at the 2nd Session of the 9th NPC on 15 March 1999 and entered into force on 1 October 1999. The relationship between competition law and contract law in the PRC is a topic worth to be explored further. Several provisions of the Chinese Contract law have already been referred by litigants to sue their competitors, for example, the dispute between Dongjin and Intel Corp.[7]

According to the Contract Law, a contract shall be voidable if (1) it is reached through fraud or coercion by one party and the contract damages the state interest; (2) malicious collusion is conducted to damage the interest of the State, of a collective entity or of a third party; (3) an illegitimate purpose is concealed by legitimate behaviour; (4) it damages the public interest; (5) it violates the compulsory provisions of laws and administrative regulations.[8] The Contract Law also provides that a technology contract which monopolizes technology or impedes technological progress,

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[5] Price Law 1997, arts 14 and 40.

[6] Bidding Law 1999, arts 32 and 53.

[7] See 6.4.1, below.

[8] Contract Law 1999, art 52.

or infringes technological achievement of others shall be null and void.[9] Furthermore, parties of a technology transfer contract may agree the scope of the use of a patent or know-how, provided that no restriction is imposed on technological competition and development.[10] Although the interface between contract law, competition law and IP law is by no means an easy subject and will not be further analyzed here, the ambiguous relationships and wider implications should not be ignored and therefore deserve a further enquiry.

5.2.5 The Criminal Law 1997

The Criminal Law prohibits bidder rigging. Collusive bidders and bidders and bid-inviters are subject to a fixed-term imprisonment up to three years, or criminal detention and/or a fine.[11]

5.2.6 The Interim Provisions on Prohibiting Monopolistic Pricing Behaviour 2003

In June 2003, the NDRC adopted *the Interim Provisions on Prohibiting Monopolistic Pricing Behaviour* (the Monopolistic Pricing Provisions), which entered into effect on 1 November 2003. The Monopolistic Pricing Provisions function as one of implementing regulations to the Price Law, and are aimed at prohibiting monopolistic pricing behaviour, promoting fair competition, and protecting legitimate interests of business operators and consumers.[12]

A new concept 'monopolistic pricing behaviour' is introduced into the Chinese law, which was defined as 'controlling market price through collusion between business operators or through abusing of market dominant position and therefore disturbing

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[9] Ibid, art 329.

[10] Ibid, art 343.

[11] Criminal Law 1997, art 223. The Criminal Law was adopted at the 2nd Session of the 5th NPC on 1 July 1979; it was amended at 5th Session of the 8th NPC on 14 March 1997, and was revised in 1999, 2001 (twice), 2002, and 2005 respectively.

[12] The Monopolistic Pricing Provisions 2003, art 1.

normal production and operation order, impeding legitimate interests of other business operators or consumers, or harming the social public interests.'[13] Business operators are prohibited from entering agreements, decisions or concerted practices which fix or change price, limit output to control price, control price in bidding or auctioning activities, and other price-controlling behaviour. Therefore, the Monopolistic Pricing Provisions, as regards restrictive agreements, provide a detailed explanation to Article 14 (1) of the Price Law which only generally prohibits controlling market price through collusion.[14]

5.2.7 The Measures for Administration of Fair Trading between Retailers and Suppliers 2006

A newly adopted ministerial rule, the 2006 *Measures for Administration of Fair Trading between Retailers and Suppliers* (the Retailers and Suppliers Measures), is however a noteworthy newcomer. The Retailers and Suppliers Measures were jointly issued by five agencies at ministerial level in October and entered into force in November 2006.[15] Several provisions of this legislative document regulate restrictive agreements. For example, retailers and suppliers are prohibited from impeding market transaction order and fair competition as well as from damaging legitimate interests of their trading partners.[16] Furthermore, retailers are generally prohibited from (1) restraints of suppliers' pricing ability when suppliers directly supply consumers and other undertakings; and (2) restraints of suppliers' ability to supply or to provide distribution services to other retailers.[17] Suppliers are prohibited from (1) tying; and (2) restraints of retailers' ability to sell commodities of other suppliers.[18]

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[13] Ibid, art 2. See 6.2.4, below, for discussion of the Monopolistic Pricing Provisions on abuse of dominance.

[14] Ibid, art 4 and Price Law 1997, art 14.

[15] The five agencies are the MOFCOM, NDRC, MPS, SAT, and SAIC. No English edition of the Measures for Retailers and Suppliers is available. The Chinese official text is available at: <http://www.gov.cn/ziliao/flfg/2006-10/18/content_416305.htm>. An English version of a speech by Mr Huang Hai, the Deputy Minister of the MOFCOM regarding this legislative document is available at: <http://huanghai2.mofcom.gov.cn/aarticle/speech/200611/20061103664989.html>.

[16] The Measures for Retailers and Suppliers 2006, art 4.

[17] Ibid, art 7.

[18] Ibid, art 18.

According to the Retailers and Suppliers Measures, departments of commerce, price, taxation, and industry and commerce at local levels are responsible to implement this legislative document and to supervise the prohibited behaviour. If a conduct is suspected as a criminal offense, it will be investigated by the public security departments (the police).[19] As regards the possible overlapping between the legislative document and other laws and regulations, if other laws or regulations provide similar rules on prohibited behaviour, other laws or regulations shall prevail. Otherwise, the Retailers and Suppliers Measures are applicable. The liabilities of infringement include order to rectify the conduct and a fine up to RMB 30,000.[20]

The Retailers and Suppliers Measures shed some light on features of distribution agreements in the PRC, among which countervailing buying power is significant and vertical restraints are often connected with abuse of market dominant positions by supermarket chain stores.[21] However, as one of ministerial rules and set at a lower level of the hierarchy of Chinese law, the Retailers and Suppliers Measures have some typical weaknesses, including vague definition of regulated subject matters, decentralized and/or overlapping enforcement power, and ill-designed procedure, liabilities and remedies. For example, the deterrent effect of a fine up to RMB 30,000 is subject to doubt. Secondly, there is no assurance to a due process of investigation and decisional practice by the five agencies' local departments. Thirdly, the implementation might be counter-efficiency because a simple *per se* rule appears to be chosen to prohibit certain distribution practices which, however, can be both pro-competitive and anti-competitive. Furthermore, one may ask, if all legislative documents have similar articles as the proposed AML and the Retailers and Suppliers Measures to delegate applicable rules to 'other laws and regulations which provide

[19] Ibid, art 20.

[20] Ibid, art 23.

[21] See speech by *Huang Hai* (n 15) above.

provisions', which document and authority could be the end of this circle of conflicts on legislative hierarchy?

5.3 Restrictive Agreements under the Anti-Monopoly Law 2007

5.3.1 Monopoly Agreement (*Longduan Xieyi*): A Concept that Results Ambiguity

Since 1999, the proposed AML has chosen the term 'monopoly agreements' to refer to restrictive agreements. The final wording of the AML defines the term as 'agreements, decisions or other concerted practices that eliminate or restrict competition'.[22] The AML provides an illustrative list of prohibited monopoly agreements. Competing undertakings are prohibited from price fixing, output restriction, market sharing, restriction on products or technology developments, joint boycott, and other horizontal practices determined by the AMEA. Non-competing undertakings are prohibited from fixing the resale price, restriction of minimum resale price, and other vertical practices determined by the AMEA. Industry associations are specifically prohibited from organizing undertakings to engage in monopoly agreements.[23] Monopoly agreements are categorized together with abuse of dominant market position and certain concentration of undertakings as three types of 'monopolistic conduct', which is the principal subject matter of the AML.[24]

However, although the definition given by the AML is in line with the EC model in relation to restrictive agreements, the notion of 'monopoly agreements' is problematic and tends to cause confusion because monopoly, market dominant position, or sufficient market power is not a threshold requirement for triggering prohibition of the AML on monopoly agreement. Furthermore, the definition given by the AML does not explicitly limit 'who' could be parties of alleged 'monopoly agreements' but emphasizes on 'agreements...' that 'eliminate or restrict competition'. There is no *de minimis* doctrine explicitly adopted by the AML. 'Eliminating or restricting

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[22] AML, art 13.

[23] AML, art 16.

[24] AML, art 3.

competition' should therefore be seen as the primary gravity of the definition of monopoly agreement.

In addition, an obvious mismatch can be seen from the AML's prohibition and exemption mechanism on restrictive agreements. The AML exempts agreements aimed at 'improve efficiency and enhance competitiveness of small and medium-sized undertakings', subject to some conditions.[25] There appears a linguistic or logical difficulty to categorize agreements between small and medium-sized undertakings to 'monopoly agreements' and then to exempt the agreements.

From the terms 'contract', 'combination', or 'conspiracy in restraint of trade' of Section 1 of the Sherman Act to 'agreement, decision and concerted practice' of Article 81 EC, the concepts of 'collusion', 'restrictive agreements' or 'anticompetitive agreements' have been developed and many jurisdictions have chosen similar terms based on either US or EC model referring to horizontal and vertical restraints.

For example, Section 3 of the Japanese Anti-Monopoly Act prohibits entrepreneurs from 'unreasonable restraint of trade', which means 'business activities, by which any entrepreneur, by contract, agreement or any other concerted actions, irrespective of its names, with other entrepreneurs, mutually restrict or conduct their business activities' ... 'thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.'

Section 34 Prohibition of Singapore's Competition Act 2004 chooses a general notion of 'agreements' exactly based on the model of Article 81 EC. In Taiwan, Article 7 of Fair Trade Act of 2002 chooses the notion 'concerted action' which refers to 'the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding' and limits its applicability to 'competing enterprises' and therefore does not apply to vertical agreements.[26] However, the Taiwanese law does

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[25] AML, art 15 (3).

[26] Mark Williams, *Competition Policy and Law of China, Hong, Kong and Taiwan* (Cambridge University Press,

regulate some forms of vertical restraints in Article 18 and Article 19 under Chapter III Unfair Competition. For example, Article 18 provides that 'the trading counterpart and the third party shall be allowed to decide their resale prices freely; any agreement contrary to this provision shall be void'. In Article 19(6), enterprise is prohibited from 'limiting its trading counterparts' business activity improperly by means of the requirements of business engagement. In this aspect, it can be seen clearly that the Taiwanese competition law is based on the Japanese model in which 'vertical restraints are covered under the section on unfair business practices.'[27]

However, apart from the PRC, it seems no other jurisdiction chooses the term 'monopoly agreements'. In the July 2003 Joint Comments on the proposed AML, ABA experts observed problems that might be caused by this term. Without further comments and explanations, the ABA working group suggested using the term of 'prohibited agreements' in order to avoid confusion because the illegality of these types of restraints does not depend on the market position of the actors.[28] However, in Chinese language, '*bei jinzhi de xieyi*', the translation of 'prohibited agreements', seems clumsy with remote meanings that might be more difficult to be characterized in the AML's future interpretation and implementation. This could be a reason for why Chinese legislators apparently paid attention to the two Joint Comments submitted by ABA in 2003 and 2005, revised the proposed AML in several aspects accordingly, however ignored this particular suggestion on a fundamental concept.[29] Owen and others also recognize this flaw and comment that '[u]se of the word "monopoly" in the section concerned with "agreements" may create unnecessary confusion' but they also

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Cambridge 2005) 385.

[27] *Dabbah* (n 1) 276.

[28] American Bar Association (ABA), *Joint Comments on the Proposed Anti-Monopoly Law of the People's Republic of China, at:* <http://www.abanet.org/antitrust/comments/2003/jointsubmission.pdf> July 2003, and, <http://www.abanet.org/antitrust/comments/2005/05-05/commentsprc2005woapp.pdf> May 2005.

[29] For example, following the ABA 2003 Joint Comments (n 28) (at pp 4 and 6), the proposed AML has abolished the original individual notification and exemption mechanism since the April 2005 Draft, although a more direct reason for this changing approach might be the impacts of the modernization of EC competition law. Since the July 2005 Draft, the proposed AML has a separate article to regulate resale price maintenance instead of arranging the prohibition of RPM in the middle of six types of horizontal restraints, which was also criticized by the ABA 2005 Joint Comments (n 28) (at pp 2 and 9-11).

offer not further analysis and suggestions.[30]

A possible explanation for choosing the term 'monopoly agreement' is that the PRC has chosen 'anti-monopoly law' as the title for this major competition legislation. The term 'monopoly agreement', compared with 'restrictive agreement', would be easier to comprehend by the public.[31] However, this explanation is difficult to reconcile with the fact that China has also implanted an EC 'abuse of dominance' concept instead of a US notion of 'monopoly or attempt to monopolization' in the following section of the AML. Although the Chinese were unfamiliar with the notion of abuse, after many years legislative debate, the notion is no longer a stranger to the public.[32] This fact has proven that completely new legal concepts could be transplanted in the PRC after sufficient advocacy despite the fact that it is too early to predict the effectiveness of the transplantation.[33] Furthermore, in several major works on EC and US competition laws by Chinese scholars, the concept of 'restrictive agreements' has been thoroughly examined. These academic endeavours have laid sufficient foundation for transplanting the concept into the Chinese context.[34]

For the reason given above, this author proposes that the notion of restrictive agreements would better serve the functioning of the AML than the term of monopoly agreements. It is hoped that future developments of the AML could choose '*xianzhi jingzheng xieyi*' (restrictive agreements) instead of the current '*longduan xieyi*' (monopoly agreements) to conform to the accepted international practice and to avoid unnecessary interpreting and implementing confusion. In the following sections, this

[30] Bruce M. Owen *et al.* 'Antitrust in China: The Problem of Incentive Compatibility' (AEI-Brookings Joint Center for Regulatory Studies, September 2004, revised July 2006), <http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/php7d.pdf>, at 32.

[31] To the writer's best knowledge, no Chinese legislative documents or literature have ever discussed the reason to choose the term of 'monopoly agreement' and the problem might be caused by the term. The explanation offered here is based purely on this writer's analysis from Chinese-English linguistic perspective.

[32] Discussions on 'abuse of market dominant position' are frequently conducted by Chinese public and the media recently.

[33] See discussion in ch 6, below.

[34] See Wang Xiaoye, *Ougongti Jingzhengfa* (EC Competition Law) (Beijing, China Legal Publishing House, 2001) 88-184; Kong Xiangjun Kong, *Fanlongduanfa Yuanli* (The Principles of Anti-Monopoly Law) (Beijing, China Legal Publishing House, 2001) 297-488.

author uses the term 'restrictive agreements' when analyzing horizontal and vertical practices prohibited by the AML.

5.3.1.1 Horizontal Agreements

The AML prohibits competing undertakings to reach monopoly agreements including price fixing, output restriction, markets sharing, restriction on products or technology developments, joint boycott, and other horizontal practices determined and prohibited by the AMEA.[35]

Horizontal agreements such as price fixing cartels are not uncommon in the Chinese market. From as significant as airlines tariff cartels at national level to as small as rice noodle producers cartel at local level.[36] Considering the current legal and regulatory instruments only offer rules on price fixing and bid rigging with weak enforcement such as Article 14 of the Price Law and Article 15 if the AUCL, the relevant rules of the AML should be an important step to fight against hardcore cartels in China.

A noteworthy point is that Chinese legislators' attitude towards horizontal agreements is ambiguous. This fact might compromise the AML horizontal rules' future enforcement to certain degree.

During the first reading of the proposed AML in June 2006, several commissioners of the 10th SCNPC questioned the rules on prohibiting horizontal restrictive agreements. For example, after explained why Chinese toy products were boycotted in Sweden, Mr. Zheng Gongcheng commented that the proposed AML to prohibit price fixing 'should not go too far'. Mr. Zheng further stated that price cartels are sometimes necessary to avoid vicious competition between Chinese manufacturers, to improve safety and health conditions and general welfare of Chinese labour, and to avoid being taken

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[35] AML, art 13.

[36] Zhongxin She (Chinanews), 'Jipiao jiage lianmeng shi jiage longduan' (Price cartel between airlines is monopolistic behaviour) (Beijing, 16 May 2001), at <http://www.china.org.cn/chinese/MATERIAL/33972.htm>, and case analysis of a rice noodle cartel in Yingshan County in 1996, in *Kong* (n 34) 852-854.

advantage by developed countries.[37] These comments were typical and representative and indicated a tendency of using competition law as a cure-all.

5.3.1.2 Vertical Agreements

The AML further provides a separate article to prohibit non-competing undertakings from fixing the resale price, restriction of the minimum resale price, and other vertical practices determined by the AMEA.[38]

Two concerns have arisen over the statutory language of the AML on vertical restraints. First of all, as regards resale price maintenance (RPM), it is not clear that whether the AMEA and courts will distinguish maximum and recommended RPM from fixed and minimum RPM. Until recently, the EC and US competition doctrines often deal with fixed and minimum RPM as hardcore restraints or *per se* illegal practice but assess maximum and recommended RPM more favourably. For example, The US Supreme Court established rule of *per se* illegality for minimum RPM in *Dr. Miles in* 1911, applied the *per se* rule to maximum RPM in *Albrecht* in 1968, but eventually overturned the *Albrecht* principle and applied rule of reason to maximum RPM in *State Oil Co. v Khan* in 1997.[39] In the EC, Regulation 2790/1999 blacklists fixed or minimum RPM, whether directly or indirectly enforced, as hardcore restraints. Such provisions are non-severable and including them will result in entire agreements falling outside the Regulation.[40] Settled EC case law on distribution agreements such as *Pronuptia de Paris* and *Metro I* basically condemn fixed or minimum RPM as 'restriction by object' and such agreement terms will usually be void.[41] However, on

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[37] Commissioners discussion on the proposed AML's First Reading Draft is available at: <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=350218&pdmc=1125> (in Chinese).

[38] AML, art 14.

[39] *Dr. Miles Medical Co. v John D. Park & Sons Co.* 220 U.S. 373 (1911); *Albrecht v. Herald Co.* 390 U.S. 145 (1968); *State Oil Co. v Khan* 188 S. Ct. 275 (1997); See, also, Gustavo E. Bamberger, 'Revisiting Maximum Resale Price Maintenance: State Oil v. Khan (1997)', in John E. Kwoka, Jr. & Lawrence J. White (eds) *The Antitrust Revolution: Economics, Competition, and Policy* (4th edn Oxford University Press, New York 2004) 334-336.

[40] Reg 2790/99, art 4(a) OJ L336/21 on the application of Article 81(3) to vertical agreements and Commission Guidelines on vertical restraints paras 47 and 66.

[41] *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgalis*: 161/84, [1986]ECR 353, [1986] 1 CMLR 414; *Metro SB-Goflmarkte GmbH & Co. KG v Commission (Metro I)*: 26/76, [1977] ECR 1875.

28 June 2007, in a landmark decision Leegin involving a leather goods manufacturer's decision to cut off sales to a retailer that had been cutting prices in violation of an alleged RPM agreement, the US Supreme Court has overruled the *per se* illegal ban on RPM.[42] The Court held that the legality of RRM practice will be decided on a case by case basis. RPM will be assessed under the *rule of reason* standard and will be deemed as lawful if the pro-competitive effects of an RPM agreement outweigh its anticompetitive effects. RPM would remain unlawful if it is used to facilitate a horizontal agreement among competitors to restrict competition.

Chinese literature on EC and US practice on price vertical restraints may however cause confusion and the status quo of Chinese decision-makers' and practitioners' understanding towards this area seemed insufficient. For example, Kong, a former enforcer at the SAIC and currently a Justice at the PRC Supreme People's Court (SPC), introduce US, EC and Australian rules on RPM without clearly distinguished fixed or minimum RPM from maximum or recommended RPM and without follow the recent three decades trends in RPM worldwide. Kong states that 'RPM is subject to per se rule in most countries'; 'US antitrust laws always condemned RPM'; and, '[i]n principle, RPM, no matter minimum or maximum fixed, is condemned under the *per se* illegality'.[43]

Secondly, apart from prohibiting RPM, the First Read Draft provided a 'catch-all' approach to prohibit imposing 'other' trading conditions that 'eliminate or restrict competition', without giving further explanations on the meaning and scope of the word 'other'.[44] Although the final wording of the AML does not follow this approach, it does provide that other (vertical) monopoly agreements determined by the AMEA may be prohibited.[45] It is uncertain how broadly the AML's future development will incorporate rules and norms on franchising, single branding, exclusive distribution and

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[42] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 127 S. Ct. 2705 (2007).

[43] *Kong* (n 34) 466-472.

[44] The First Reading Draft, art 8.

[45] AML, art 14 (3).

supply, selective distribution, and other distribution arrangements. Furthermore, how vertical restraints prohibition and exemption will be implemented in China is in doubt considering the complicacy and flexibility of this area if one takes a close look at EC and US competition law history.

As observed by a commentator, '[f]rom an economic point of view, all types of vertical restraints are capable of being either pro-competitive or anti-competitive, depending on the surrounding circumstances'.[46] However, a case-by-case evaluation approach would be too demanding for agencies and the courts, and too uncertain for undertakings concerned.[47] Reflected by the European experience, the EC block exemption regulations and relevant guidelines have been developed over the years in searching for administrable and workable rules on vertical restraints (and on some beneficial horizontal restraints). There has been a fundamental change in the EC Commission's approach from a strict and formalistic approach to a more economic-based approach since 2000.[48] From Brown Shoe *(1966)* to *Sylvania (1977)*, the US antitrust law scrutinizes vertical restraints, especially non-price restraints, far more favourably than it did several decades ago.[49] The strand in US antitrust practice has suggested that 'courts generally presume that non-price vertical restraints are designed to increase efficiency and should be permitted except in extraordinary circumstances.'[50] One can thus reasonably expect that China also needs a sufficient period of time to learn and to adapt. Although such a period could be much shorter with capacity building in Beijing and effective technical assistance from advanced

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[46] Joanna Goyder, *EU Distribution Law* (4th edn Hart Publishing, Oxford 2005) 67.

[47] Ibid, 67.

[48] Reg 2790/99 OJ L336/21 on the application of Article 81(3) to vertical agreements; Reg. 2658/00 on the application of Article 81(3) of the Treaty to categories of specialization agreements; Reg. 2659/00 on the application of Article 81(3) of the Treaty to categories of research and development agreements.

[49] In *FTC v Brown Shoe Co.* 86 S.Ct. 1501 (1966), 'the Court upheld the FTC's condemnation of a franchise plan where a shoe supplier's promised not to carry shoes competing with the franchisor's lines even though the record contained no evidence of the market share affected or the extent to which competing shoe suppliers were foreclosed, and the dealers could terminate the agreements at any time', see, Gellhorn and others, *Antitrust Law and Economics in a Nutshell* (5th edn West Publishing Co., St. Paul, Minn. 2004) 397-401; In *Continental T.V., Inc. v GTE Sylvania Inc.*, 97 S.Ct. 2549 (1977), the Supreme Court held that the rule of reason governed vertical restraints other than RPM.

[50] *Gellhorn and others* (n 48) 370.

jurisdictions, clarification and interpretation of rules on vertical restraints will be a challenging task to the Chinese competition authority and the courts with far-reaching implication to the business in the future.

In addition, neither the EC nor the US original statutory language has sufficiently clear rules on specific vertical restraints. The vertical restraint jurisprudence has been developed by agencies' decisional practice and courts' case law in the EC and the USA, with the former has developed concurrent block exemption mechanism. Requesting China to absorb all these developments and to adopt them according to its own needs at this still early stage of competition law development is unrealistic. The effectiveness of Chinese rules on restrictive agreements is nevertheless depending on how widely the relevant AML rules are interpreted and how quickly future block exemption regulations are adopted. 'Confining and structuring discretion' in the process of regulating restrictive agreements also request developing rules through adjudication by the AMEA to use its rule-making power and through future legislative and non-legislative instruments to clarify rules and norms.[51]

5.3.1.3 Bid Rigging

5.3.1.3.1 Why Bid Rigging was Treated Separately?

From July 2004 Draft to the First Reading Draft, the proposed AML had provided a separate article to deal with bid rigging and thus had distinguished this type of behaviour from horizontal and vertical restraints.[52] Although the AML finally gives up this approach, treating bid rigging separately has historical reasons and may still have implications to the AML's future interpretation.

Dissimilar to commonly accepted classification which deals with bid rigging as one typical form of horizontal practices, bid rigging in Chinese context has or has been perceived to have both horizontal and vertical features since the enactment of the 1993

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[51] *Dabbah* (n 1) 76-79.

[52] The First Reading Draft, art 9, which reads: 'Undertakings shall be prohibited from colluding on bids in [the] course of inviting bid and bidding to eliminate or restrict competition.'

AUCL.

It is commonly accepted that bidding rigging is one form of hardcore cartel. For example, European scholars and practitioners have reached consensus that hardcore or classic forms of cartels include price fixing, output restriction, market sharing and bid rigging. Jones and Sufrin describe bid rigging as 'where undertakings collaborate on responses to invitations to tender for the supply of goods and services', and observe that bid rigging 'limits price competition between the parties and amounts to an attempt ... to share markets'.[53] The cartel offence introduced by Sections 188-201 of the UK Enterprise Act 2002 explicitly prohibits four types of hardcore cartels and defines bidding rigging in Section 188(5) as '... arrangements under which, in response to a request for bids for the supply of a product or service... or for the production of a product... (a) A but not B may make a bid, or (b) A and B may each make a bid but, in one case of both, only a bid arrived at in accordance with the arrangements'. In the USA, when analyzing a bid rigging in Ohio's school milk market, Porter and Zona also define collusion in biding as an agreement among a group of firms that is designed to limit competition between the participants during bidding procedures.[54]

On the contrary, bid rigging in Chinese context implies collusions not only between bidders (competitors including goods sellers or service providers), but also between bidders and bid-inviters (competitors and buyers). In other words, big rigging in China has both horizontal and vertical characteristics. The First Reading Draft prohibited undertakings from 'colluding on bids in the course of inviting bids and bidding to eliminate or restrict competition', without providing clear signals on who could be bid rigging collusioners.[55] However, previous Chinese legislation, judicial interpretations

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[53] Jones and Sufrin, *EC Competition Law: Text, Cases, and Materials* (2nd edn Oxford University Press, Oxford 2004) 790; Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (Oxford University Press, Oxford 2003) 272-73.

[54] Robert H. Porter and J. Douglas Zona, Bidding, 'Bid Rigging, and School Milk Prices: Ohio v. Trauth (1994)', in John E. Kwoka, Jr. and Lawrence J. White (eds), *The Antitrust Revolution: Economics, Competition, and Policy* 4th edn (Oxford University Press, New York 2004) 212.

[55] The First Reading Draft, art 9.

and literatures have provided an answer. The explanations are as below.

Chinese laws on bidding rigging prior to the AML are represented by the AUCL 1993, the Criminal Law 1997, the Bidding Law 1999 and related judiciary and administrative interpretations.[56] The first law prohibits bid rigging is the AUCL which provides that: 'Bidders shall not act in collusion for bidding in order to raise or reduce the bid price. Bidders shall not collude with bid-inviters in order to eliminate other competitors from fair competition'. Bid rigging is subject to a fine from 10,000 to 200,000 RMB and the collusive bid is void. No criminal liability is stipulated by the AUCL.[57]

'Bid rigging offence' was introduced by Article 223 of the Criminal Law 1997. Under the first paragraph of Article 223, when bidders collusively submit tenders that harm the interests of bid-inviters and other bidders and when the circumstances are serious, collusive bidders shall be sentenced to up to three years fixed term imprisonment, criminal detention, and may in addition or exclusively be sentenced to a fine. This is in line with the commonly accepted feature of bid rigging as collusions between bidders. However, the second paragraph of Article 223 further provides that when bidders and bid-inviters have collusive behaviour that harm legitimate interests of the State, organisations and the public, they shall be punished in accordance with the stipulations stated in the paragraph 1 of Article 223. Article 32 of the 1999 Bidding Law has similar statutory language as the 1997 Criminal Law that defines bid rigging including collusions between bidders and between bidders and bid-inviters. The Bidding Law imposes fine, civil and criminal liabilities to offenders. Chinese scholars, when commenting on the previous drafts of the proposed AML, particularly mentioned that 'undertakings', under the relevant provision on 'bid rigging', should be interpreted to include both bidders and bid-inviters.[58]

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[56] For example, the 2004 Supreme Court Interpretation on Applicable Laws in Construction Contract Dispute Cases, the 1998 Provisional Rules on Prohibiting Bid Rigging by SAIC, the proposed Implementing Regulation of the 1999 Bidding Law by the State Council, etc.

[57] AUCL 1993, art 27.

[58] For example, Civil and Commercial Law Research Centre of Shanghai Social Science Academy, 'Revision Suggestions on the Submission Draft (July 2004) of Anti-Monopoly Law of the PRC' (2005) April Issue *Shangwu*

Bid rigging cases in China that involved collusions between bidders and bid-inviters are not uncommon, especially in government procurement and infrastructure construction projects. However, because such cases are normally give rise to bribery and business secret infringement, in practice, collusive bid-inviters are normally punished according to maximum statutory penalty among these offenses and are convicted accordingly. For example, in 2004, two officials of Yuncheng City were found guilty of bribery and were sentenced to thirteen years imprisonment. The case involved collusion between the officials and two undertakings in bid rigging schemes during restructuring process of SOE in the Yuncheng region.[59]

The previous discussion on bid rigging in China attempts to explain why the proposed AML once provided a separate article to regulate big riggings. As already explained, the practice in China or perceived by Chinese includes two forms, horizontal bid riggings between bidders and vertical bid riggings between bidders and bid-inviters. In most cases, vertical bid riggings involve officials acting as collusive bid-inviters. Further detailed examination on relationship between bid riggings and other involved offenses such as bribery is beyond the scope of this thesis. However, for the sake of convergence and harmonization of competition laws worldwide, whether China should follow the commonly accept approach on regulating bid riggings may need to be addressed in the future. Encouragingly, the AML finally chooses not to treat bid rigging separately but use one single provision to regulate all horizontal agreements.[60]

5.3.1.3.2 Bid Rigging Offence under the Criminal Law

The First Reading Draft once provided that 'undertakings implementing monopolistic conduct ... (which) constitutes crime shall be imposed criminal penalties in

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yu Falu (Commerce & Law) 46.

[59] Zhongxinshe (Chinanews), 'Shanxi Yuncheng liang zhengfu guanyuan shou heqian beipan 13nian' (Two Officials are sentenced to 13 years imprisonment separately for briberies involving a bid rigging) (Beijing, 20 June 2004), at: <http://www.chinacourt.org/public/detail.php?id=120292&k_title=串通投标&k_content=串通投标&k_author=>.

[60] AML, art 13.

accordance with the laws'.[61] ABA working group suggested that more clarity was needed with regard to which types of behaviour will be subject to criminal liability implied by the proposed AML.[62] The comment is highly relevant for the sake of legal certainty and indicate a possible 'cartel offence' under the Chinese law. However, this writer's observation is, at present, cartel offence in China is only limited to bid rigging. 'The laws' used by the First Reading Draft implicitly refers to the 1997 Criminal Law and related legislative and judicial interpretations, among which no criminal liabilities has been provided to restrictive agreements, abusive behaviour and undertakings' concentrations apart from bid riggings. Thus, the answer for this question must be that only bid riggings could be prosecuted criminally under the current Chinese legal framework. However, one may predict that since the consequences of bidding riggings are comparable to other hardcore cartels, cartel offence may be introduced into Chinese law through future revisions to the Criminal Law and to the AML.

5.3.2 The Prohibition and Exemptions

5.3.2.1 The Prohibition

Since July 2005, the proposed AML has given up its previous approach of using one provision to prohibit both horizontal and vertical restrictive agreements. Such a change is in part because of strong influence from German and Japanese competition laws on restrictive agreements and from comments on previous AML drafts.[63] A noteworthy point is that, also in July 2005, with the 7th Amendment to the *German Act Against Restraints of Competition* (GWB) coming into force, the GWB provisions have been adapted to EC competition law. Among several changes is the termination of 'the differentiation between the legality of vertical and illegality of horizontal restraints on competition and provides for the equal treatment for both'.[64]

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[61] The First Reading Draft, art 49.

[62] *ABA* (n 28) Joint Comments 2005, 5.

[63] Chinese legislators seemed struggling between a separate and an integrated legislative approach towards restrictive agreements because the July 2004 Submission Draft chose a separate approach but the April 2005 Draft was back to an integrated approach. The AML's final wording followed the separate approach however. See comments on AML rules on restrictive agreements, Wang Xiaoye, *Comments on Latest Draft of Chinese Antitrust Law (the May 2005 Draft)*, speech delivered at the 2005 Legislative Affairs Office of the State Council Symposium on Chinese Anti-Monopoly Law, 2; *ABA* (n 28) Joint Comments 2005, at 3 and 10-11.

[64] See Ashurst, 'Modernisation of German competition law – The 7th Amendment of the GWB', *Ashurst:*

5.3.2.2 The Exemptions: a Codified Rule of Reason?

The AML establishes an exemption mechanism stipulating that the prohibition on horizontal and vertical restrictive agreements shall not apply if the undertakings involved can prove that the agreements in question could meet three criteria. These criteria are: (1) aiming for the realization of recognized objectives by the AML; (2) not substantially eliminating competition in the relevant market; and, (3) enabling consumers to share the interests derived from the agreements.[65]

There seems no exemption available for bid rigging which is prohibited implicitly as a hardcore restraint by the AML. However, the recognition and proof of bid rigging is by no means a straightforward task. For example, although bid rigging as a hardcore cartel activity is unlikely to meet the Article 81(3) EC criteria, in *FIEC/CEETB*, the EC Commission stated that 'it would take a favourable view of an agreement designed to standardize and reduce the cost of the tendering process between building contractors and sub-contractors but which would not in any way limit either the firms who could tender or the prices at which they could tender'.[66]

Chosen by the April, July and November 2005 Drafts, a criterion which requires that agreements 'are necessary for realization of the (claimed) objectives' has been deleted since the First Reading Draft. Otherwise, the AML exemption criteria for restrictive agreements would be very similar to the Article 81(3) EC model at the first glance.[67]

Competition Law Update August 2005 at, <http://www.ashurst.com/doc.aspx?id_Content=1926>; also see introduction by the German Federal Cartel Office, at <http://www.bundeskartellamt.de/wEnglisch/CompetitionAct/CompAct.shtml>.

[65] AML, art 15.

[66] *FIEC/CEEFB* [1998] OJ C52/2, quoted in *Jones and Sufrin* (n 52)808.

[67] See Article 81(3) EC and the Commission's Guidelines on the application of Article 81(3) [2004] OJ C101/97. Article 81(3) sets out two positive and two negative criteria that are cumulative and exhaustive, as the agreement, decision, or concerted practice which is caught by Article 81(1) but seeks exemption by Article 81(3) must, (1) contribute to improving the production or distribution of goods or to promoting technical or economic progress; (2) allow consumers a fair share of the resulting benefit; (3) not impose non-indispensable restrictions; (4) not afford the parties the possibility to substantially eliminating competition.

From the EC experience, this omitted necessity criterion is however significant and needs to be incorporated in the AML either by future AML revision, secondary legislation, or by the law's interpretation and implementation. Article 81 (3) EC demands that no dispensable restrictions have been imposed and the Commission's Guidelines further require that the indispensability of the agreement be considered both with respect to the whole contract and its individual clauses.[68]

Substantial concerns have also arisen as regards the three existing criteria for the AML restrictive agreement exemptions. Especially the first substantial criterion, 'aiming for the realization of objectives recognized by the AML', is further developed by the second paragraph of Article 14 AML, which may imply more space for discretionary power than its counterpart in Article 81(3) EC.[69] The AML recognizes six objectives plus a sweeper clause that exempts 'other circumstances as stipulated by law and the State Council'.[70] Specified circumstances under exemptions include, (1) to improve technology, research and to develop new product; (2) to upgrade product quality, reduce cost, enhance efficiency, and unify specifications and standards of products; (3) to improve operational efficiency and enhance competitiveness of small and medium-sized undertakings; (5) to realize social public interests such as energy saving, environment protection, and disaster relief; (6) during the period of economic depression, to moderate serious sales decreases or production surpluses; and (7) to ensure legitimate interests in foreign trade and economic cooperation. As one could see from the statutory text, the exemption mechanism envisaged by the AML has chosen multi-layer and non-exhaustive standards which mix considerations of efficiencies, trade and industry policy, and social public interests, etc.

Having said all that, expecting the AML to extinguish non-competition considerations might be unrealistic. Although advanced competition policy systems have developed

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[68] *Goyder* (n 45) 28 and 31; Maher M Dabbah, *EC and UK Competition Law* (Cambridge University Press, Cambridge 2004) 121.

[69] AML, art 15.

[70] Ibid.

more certainty and less discretion through case law and legislative instruments, the USA, for example, has also granted antitrust exemption to export cartels by enacting the Webb-Pomerene Act.[71] What China could learn from the US experience is to clarify the criteria for export cartels anti-monopoly exemption. The reason for this suggestion is that even the AML text may be revised and export cartel exemption be removed, China can still grant similar exemption through other policy instruments. This thesis will not deal with the policy considerations of export cartel anti-monopoly exemption any further which are related to Chinese trade and industry policy. However, the concern, for the purposed of competition law, is that what is meant by 'legitimate interests in foreign trade and economic cooperation' need to be clarified. If this implies an export cartel exemption, the relationship between the exemption and the prohibition and the criteria applicable to the exemption must also be clarified.

Furthermore, as noted by several commentators, regarding the AML exemption mechanism, there is no distinction between hardcore restraints or '*per se* prohibitions' and less problematic practices or a 'rule of reason analysis'.[72] When commenting on the May 2005 Draft, Professor Xiaoye Wang states that the exemption scheme applicable to hardcore restraints such as price cartels and quantity cartels will render Chinese Anti-Monopoly Law inconsistent with well-established fundamental antitrust principles.[73]

Nevertheless, the dichotomy of treatment between hardcore and non-hardcore restraints always blurs even in the advanced systems of competition laws, and 'there is often no bright line separating *per se* form rule of reason analysis'.[74] For example, although the EC and US competition laws have been much more suspicious towards horizontal restraints than vertical restraints and have categorized many horizontal

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[71] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, Cambridge 2004) 29.

[72] Youngjin Jung and Qian Hao, 'The New Economic Constitution in China: A Third Way for Competition Regime?' (2003) Vol. 24 *Northwestern Journal of International Law and Business* 46; ABA, Joint Comments 2003, 3.

[73] *Wang* (n 61) 2.

[74] *National Collegiate Athletic Ass'n v Board of Regents of University of Oklahoma* 468 US 85 (1984).

practices as 'hardcore restriction' or condemned under a per se illegality, it has been commented that major aspects of doctrine governing horizontal relationships 'are among the most complex and unsettled areas of antitrust law today'.[75]

In the noteworthy 1979 *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (BMI)[76], a case involved a blanket licensing mechanism for musical compositions which CBS sued for violation of the Section 1 Sherman Act. CBS complained for a *per se* illegal behaviour since the blanket license worked out as a horizontal price-fixing agreement. The US Supreme Court recognized that the blanket licensing arrangement transferring the prices of different compositions into a single fee, but it emphasized that '[t]he Sherman Act has always been discriminatingly applied in the light of economic realities.' The Court examined features of copyrighted compositions market in details, including 'the impracticability of negotiating individual licenses for each composition' and the 'extraordinary number of users spread across the land'. The Court thus observed that 'not all forms of conduct that literally fix prices are plainly anticompetitive or likely to lack any redeeming virtue', and then chose a 'modified rule of reason approach'.[77]

The BMI case has particular implications to the AML prohibition and exemption on restrictive agreements and to the interface between restrictive agreements and IPRs in the PRC. The AML has incorporated a provision to deal with the possible clash by stating the AML is not applicable where undertakings exercise IPRs according to relevant laws and regulations. The proposed AML however is applicable to conduct eliminating or restricting competition through abuse of IPRs.[78] This rule appears to exclude a 'per se illegal' approach to restrictive agreements involving IPRs. However, how use and abuse of IPRs will be interpreted under the AML is by no means certain at present.

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[75] *Ernest Gellhorn and others* (n 48) 200.

[76] *Broadcast Music, Inc. v Columbia Broadcasting System, Inc.* 441 U.S. 1, 99 S.Ct. 1551, 60 (1979).

[77] *Gellhorn and others* (n 48) 101 and 226-231.

[78] AML, art 55.

As noted by commentators as regards the *Chicago Board of Trade v United States (1918)*, one difficulty with the case was that

> ...it indirectly fostered a harmful distortion in the evolution of Section 1 doctrine. Judges and plaintiffs came to perceive that Section 1 offered only two analytical tools: an administratively simple rule of per se illegality and an administratively hopeless rule of reason.[79]

In Europe, Wils comments that there is 'some confusion as to the nature of Article 81(3) EC' since 'it may have been considered that the application of Article 81(3) EC depended or should depend on discretionary political decisions'. Wils further argues that

> Article 81 EC is the European equivalent of Section 1 of the Sherman Act. Whereas the latter reads as a single rule prohibiting all agreements in restraint of trade (similar to Article 81(1) EC), it has been interpreted by the courts as condemning only unreasonable restraints. Article 81(3) EC simply codifies this case law.

Although Wils' argument of 'there is no scope for discretionary political decisions in the application of Article 81(3) EC' is subject to doubt, his observation of 'Article 81(3) is nothing but a codified form of the American rule of reason' is meaningful for the AML.[80] The debate on whether the AML should be designed on a US style rule of reason and per se illegality or on an EC style of prohibition and exemption has never stopped during the AML legislative process.[81] For example, Zheng argues that China, as a civil law jurisdiction, should not adopt a US style rule of reason and per se illegality. However, Chinese competition law should learn from the relevant US experience, especially the balance of legal certainty and flexibility implied by the per

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[79] *Gellhorn and others* (n 48) 213.

[80] Wils, *Principles of European Antitrust Enforcement* (Hart Publishing, Oxford 2005) 6-7.

[81] Zhongbin Li, 'Heli Yuanze yu Woguo Fanlongduan Lifa Taolun' (The Rule of Reason and the Anti-Monopoly Legislation in China) (2002) 10 *Zhongguo Gongshang Guanli Yanjiu* (Administration of Industry and Commerce Review), and, Ciyun Zhu, 'Fansi Fanlongduan: Woguo yingdang Jianli Wenhexing de Fanlongduan Zhidu' (Rethinking of anti-monopoly: China should establish a soft anti-monopoly regime) (2003) 2 *Journal of Tsinghua University* (Philosophy and Social Sciences).

se illegality and the rule of reason[82]

However, what kind of codified rule of reason the AML is about to establish is uncertain at the time of writing. The relevant provisions are open to further interpretation and block exemption regulations may be urgently needed to enable the AML monopoly agreement exemption rules workable in practice.

5.3.3 Consequences of Infringement

Infringement of the AML prohibition on restrictive agreements that do not meet the three criteria for exemption may lead to investigation and penalties by the AMEA. Furthermore, bid rigging is explicitly subject to criminal liabilities. Remedies for the infringement include orders to cease the conduct, the confiscation of illegal gains, and fines (between 1-10 % of previous annual turnover). For non-implemented monopoly agreements, a fine of up to RMB 500,000 can be imposed. Furthermore, the AMEA may reduce or exempt sanctions for undertakings that voluntarily report important information and evidence concerning monopoly agreements. In addition, offenders are also liable to damages to injured undertakings. Unsatisfied parties may apply for administrative reconsideration to decisions made by the AMEA, and then bring administrative litigation towards the result of the administrative reconsideration. Parties are also allowed to bring administrative litigation without seeking administrative reconsideration.[83]

5.3.3.1 Nullity and Severability

The proposed AML once provided that the prohibited restrictive agreements shall have no effect *ab initio*.[84] Although following the Article 81(2) EC model, a noteworthy point is that the ECJ has held that the nullity affects only the clauses in the agreement

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[82] Pengcheng Zheng, 'Lun Benshen Weifa yu Heli Faze' (On the per se Illegality and the Rule of Reason), (2005) 1 Jingzhengfa Pinglun (Competition Law Review) pp 59-78.

[83] AML, arts 46 and 53. Also see ch 8, below.

[84] The First Reading Draft, art 11.

prohibited by the relevant competition provision.[85] The whole agreement is void only when the prohibited clauses cannot be severed from the remaining terms of the agreement. The Commission's *Guidelines on Vertical Restraints* further clarify the rule and state that there is no severability for hardcore restrictions in vertical restraints, including fixed or minimum RPM and market partitioning by territory or by customer with four exceptions.[86] It is to be hoped that the rule of severability will be transplanted by the AML future development.

In fact, the Foreign Economic Contract Law of the PRC incorporated the rule of severability as early as 1985.[87] According to this law, a voidable economic contract was ineffective from the beginning. However, if part of an economic contract became invalid, the other parts should remain effective. Later in 1999, the Contract Law also provides that if part of a contract is null and void without affecting the validity of other parts of the contract, the other parts shall still be valid.[88] Therefore, one can predict that the future AML practice will follow this rule even the wording of the relevant articles may keep silent.

5.3.3.2 A Leniency Programme?

The AML provides that if undertakings involved in monopoly agreements on their own initiative report information concerning the conclusion of monopoly agreements and provide important evidence to the AMEA, they may be given a mitigated punishment or be exempted from punishment.[89] This rule provides signals on a leniency mechanism as a supplemental instrument to detect and fight against hardcore cartels. Nevertheless, the effectiveness of a leniency programme depends on a series of factors

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[85] Case 56/65 *Societe La Technique Miniere v Maschinebau Ulm GmbH* [1996] EC 234, [1966] CMLR 357.

[86] Reg 2790/1999 [1999] OJ L336/21 art 4 and the Commissions' Guidelines of Vertical Restraints [2000] OJ C291/1, paras 46-51, 66.

[87] The Foreign Economic Contract Law was adopted by the 10th Session of the 6th SCNPC on 21 March 1985. This law, as well as the Economic Contract Law (1981) and the Technology Contract Law (1987), were superseded by a unified Contract Law in 1999.

[88] Contract Law, art 56.

[89] AML, para 2 of art 46, similar wording was firstly adopted by the November 2005 Draft AML.

such as potential penalty being serious enough for providing incentives to cartels members acting as 'whistle-blowers', legal certainty of reduced penalty to applying firms, and simple and straightforward admission guidelines for the programme.[90] Therefore, establishing an effective AML leniency programme is still a long way to go. In addition, as cartels are increasingly globalized, the adoption and enforcement of a leniency mechanism is calling for cooperation with other jurisdictions on cartel enforcement know-how, in general, and more research and assessment on hardcore cartels in the PRC, in particular.

5.3.4 Comments

Taking into account of the flexible and evolutionary features of competition law, developing stage of administrative and judiciary systems of the PRC and other conditions for the AML, an EC model of block exemption mechanism should, at least in theory, be easier to establish and to implement than the US per se rule and rule of reason approach. The analyses of this Chapter further explain why Chinese legislators have basically chosen an EC model.[91]

An initial declaration of hardcore and non-hardcore restraints and different treatment to them is necessary and reasonable for the sake of legal certainty, but necessary space has to be left for future developments and for scenarios that on their face might be in the hardcore category but nonetheless are worth a full market analysis. The tougher problem is how to balance legal certainty and flexibility in the Chinese context. Furthermore, as regards the restrictive agreement exemptions envisaged by the AML, several concerns are worth to be addressed carefully.

5.3.4.1 The Anti-Monopoly Exclusion

Competition law exclusion is a common legislative or enforcement practice in many jurisdictions. For example, the EC Treaty provides special rules for highly sensitive

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[90] Jiro Tamura and others, 'Japan Cartels', in *Global Competition Review: the Asia-Pacific Antitrust Review 2004* (London, Law Business Research, 2004).

[91] See ch 3, above.

sectors including agriculture, nuclear energy and military equipment, which are wholly or in part excluded from the scope of EC competition rules.[92] It has been recognized that in the USA there are two basic ways for antitrust exclusions. The first is statutory exclusion by '[c]ongress expressly declares that the antitrust laws do not apply, or apply only in a modified form,' to some specific sectors 'including agriculture, communications, energy, financial services, and insurance'. The second is antitrust exclusion by implication, 'where Congress establishes a pervasive regulatory scheme that the application of the antitrust laws would disrupt, courts sometimes hold that the activity of regulated firms in impliedly immune'. However, 'the US Supreme Court has warned that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."'[93]

In the UK, the Schedules 1-3 of the CA 1998 has excluded a wide range of agreements and situations from the Chapter I prohibition, such as agreements relating to land, agreements subject to competition scrutiny under the Broadcasting Act 1990, the Financial Services and Markets Act 2000 or the Communications Act 2003, agreements necessary for compelling reasons of public policy and which are subject to an order by the Secretary of State, and agreements relating to farmer's association, or to production of or trade in 'agricultural products' as defined in the EC Treaty and in EC Regulation 26/62.[94]

The proposed AML, on the contrary, when dealing with the anti-monopoly law exclusion, once provided a problematic declaration that it 'does not apply where other laws or administrative regulations provide provisions.'[95] Furthermore, the proposed

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[92] *Dabbah* (n 66) 128.

[93] *Gellhorn and others* (n 48) 568-569. The case law involved is *United States v Philadelphia National Bank* 83 S.Ct. 1715 (1963). A noteworthy point is that, in this book, Gellhorn using the term of 'exemptions' refers to 'antitrust immunity created by statutes and government regulations'. However, as can be seen, the scope and meaning of this term is the same as 'exclusions' used in the EC. In order to avoid confusion with the 'prohibition and exemption mechanism', this writer chooses the term 'exclusions'.

[94] *Dabbah* (n 66)131.

[95] The First Reading Draft, para 3 of art 2, which reads 'As for monopolistic conduct prohibited by this Law, this Law does not apply where other laws or administrative regulations provide provisions.'

AML authorizes anti-monopoly investigation powers to 'relevant departments and supervisory organs' by declaring that 'if there are relevant laws and administrative regulations stipulating that monopolistic conduct prohibited by this Law shall be investigated and handled by relevant departments or supervisory organs, the laws and regulations are to be applied'.[96]

Although both provisions were deleted finally, and the AML seems to grant higher authorities to the AMEA, another new provision may however function as a powerful anti-monopoly exclusion. Since the Second Reading Draft, the AML has incorporated a provision which provides that

> Undertakings in industries controlled by the state-owned economy and relied upon by national economy and national security, as well as industries that conduct exclusive and monopolistic sales in accordance with law shall be protected by the state to conduct their legitimate business activities. The state shall implement supervision, adjustment and control of business operations and pricing activities of these undertakings in accordance with law, and safeguard legitimate interests of consumers and promote technological progress.[97]

Although Article 7 may be a compromise which enables the AML politically acceptable, it is however badly designed and may be impossible to be enforced. Leaving whether or not the large number of current laws or administrative regulations playing roles in regulating competition will be revised and harmonized according to the AML, the all-power exclusion implied by Article 7 is also overlapping with the restrictive agreement exemptions to a great extent.

It is hereby submitted that: (1) A substantial task on convergence and harmonization between sectoral regulations and the AML is urgently needed in order to avoid the

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[96] The First Reading Draft, art 44.

[97] AML, para 1 of art 7.

latter being rendered powerless by 'law'. (2) Which 'law' will prevail must be clarified by a separate legislative document or by guidelines by the AMC or the AMEA in order to avoid future clash in statutory hierarchy and to provide necessary legal certainty. Unless these two proposals being implemented, the multi-layer standard restrictive agreement exemptions and the over-inclusive anti-monopoly exclusion may deprive the effectiveness of the AML to an uncertain but potentially great extent.

5.3.4.2 The Exemption for the Agriculture Sector

The First Reading Draft once granted a sectoral exemption to restrictive agreements in the agriculture sector.[98] The agricultural exemption is common arrangement in many jurisdictions. However, the wording of the agriculture exemption stipulated by the First Reading Draft was confusing because it stipulated that the law 'is not applicable to cooperation, association or other concerted conducts which do not substantially restrict competition by agricultural producers and the farmers' professional organizations ...'. One may ask whether there was an exemption at all because the problem was what was meant by 'non-substantial restriction on competition'. In other words, was such a criterion sufficiently clear in order to make this sectoral exemption workable? If the 'non-substantial restriction on competition' was 'the' criterion for applying the agriculture sector exemption, would that also imply that 'non-substantial restriction' in other sectors will be caught by the AML? If the answer to this question was negative, then what was the rational to have such an exemption? If the answer was positive, then what was the relationship between this 'non-substantial restriction on competition' criterion and the 'non-substantial elimination on competition' criterion of the AML monopoly agreement exemptions? There was hardly any reason to differentiate these two criteria, but once again, what is the rationale for having such a separate exemption for agriculture sector?

The true intent of the Chinese lawmakers as regards the agriculture sector was

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[98] The First Reading Draft, art 56, which reads 'This Law is not applicable to cooperation, association or other concerted conducts which do not substantially restrict competition by agricultural producers and the farmers' professional economic organizations during the course of production, processing, sales, transportation, storage and other operating activities of agricultural products.'

uncertain but it seemed a future block exemption regulation for the sector was what the proposed AML intended to set up. However, the EC and UK experience shows that a specified sectoral exclusion might be more appropriate than a sectoral exemption regulation.

5.3.4.3 The Necessity for Adopting Block Exemption Regulations

When commenting on the July 2002 and April 2005 Drafts, the ABA working groups define the series of objectives recognized by the first criterion of the AML monopoly agreement exemptions as 'block exemptions'.[99] The working groups went on to comment that the 'block exemptions' established by the proposed AML were 'extremely broad in scope, with parameters that are not clear and that may be difficult to apply in practice' and suggested that 'the block exemptions should be narrower, more precisely defined and definite in duration'.[100]

The contents of these comments are relevant to possible regulatory risks implied by the broad values and objectives imbedded in the AML monopoly agreement exemptions. However, whether the comments address to a correctly categorized subject matter is a question worth to be answered.

In EC competition law, block exemptions are granted 'by way of a market or transaction-specific regulation, which applies to categories of agreements that satisfy specified criteria'.[101] Block exemption regulations are 'general legislative acts' by EC Commission following authorization from the Council or directly by the Council 'which circumscribe a portion of the field where Article 81 EC is not applicable'.[102]

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[99] *ABA* (n 28) Joint Comments 2005, 3 and, Joint Comments 2003, 21.

[100] Ibid.

[101] *Dabbah* (n 66) 128.

[102] EC Commission's power to adopt exemption regulations was based on Council Regulations No. 19/65 and No. 2821/71. See discussion in G Marenco, 'Does a Legal Exception System Require an Amendment of the Treaty?' in CD Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart Publishing, Oxford 2001) 173; see also, *Wils* (n 78) 22.

Furthermore, as analyzed already[103], these recognized objectives are just part of the first criterion to qualify a general exemption for restrictive agreements, both the legislative language and expected functions of these objectives indicate that they will function as a Chinese counterpart of agreement which 'contributes to improving the production or distribution of goods or to promoting technical or economic progress', the first positive criterion of Article 81(3) EC. These recognized objectives are significant different with EC block exemption regulations and thus cannot be defined as Chinese block exemptions.

Therefore, what the AML has established is a principal framework of prohibition and exemption on restrictive agreements, block exemption mechanism could not be recognized from the current legislative language. Nevertheless, in order to activate the AML rules on restrictive agreements, there are urgent needs (1) to revise the legislative language of the AML exemption in the future; and (2) to establish a block exemption mechanism for reasons discussed as below.

The historical justification of the EC block exemption mechanism was 'as an instrument to reduce the huge number of notifications to which the Commission could not handle administratively', the current value of the block exemption mechanism is said to enhance legal certainty and to save on enforcement cost.[104] Because the AML has abandoned its previous individual or voluntary notification mechanism since the November 2005 Draft, the historical justification of establishing a block exemption mechanism is no longer relevant to China.[105] However, the 'enhancing legal certainty' and 'saving on enforcement cost' argument is particular meaningful to the PRC.

When examining the cost of the block exemption regulations, Wils offers three insightful criteria which can be referred when assessing whether there should be a

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[103] See 5.3.2, above.

[104] *Dabbah* (n 66) 128; *Wils*, (n 78) 22.

[105] Until the July 2005 Draft, the proposed AML had chosen either a mandatory or voluntary notification mechanism for obtaining exemptions for restrictive agreements.

particular block exemption regulation:

> ...for any category of agreements (i) which are very frequently concluded in business practice, (ii) for which a full individual assessment would in the overwhelming majority of cases lead to the conclusion that the conditions of Article 81(3) are fulfilled, and (iii) which can be sufficiently clearly defined, the cost saving, including the reduction of risk, at the level of self-assessment by the undertakings when concluding these agreements as well as at the level of ex post litigation is likely to outweigh the cost of adopting the block exemption regulation.[106]

Furthermore, since the text of the AML prohibition on restrictive agreements has been based on the Article 81 EC model from the day it was conceived, there is an urgent need to study the EC block exemption system, to draw lessons from the evolutionary history of the system, and to transplant the mechanism according to national conditions of the PRC.

In addition, the formidable task to strike a delicate balance between the *per se* rule and rule of reason and when to refer to which approach might be avoided to a great extent. Wils argues that the nature of Article 81(3) EC should not depend on 'discretionary political decisions' but is a 'codified form of the American rule of reason' and Article 81 EC is 'the European equivalent of Section 1 of the Sherman Act.'[107] The EC Commission also states that Article 81(3) 'in fact contains all the elements of a "rule of reason"' and presents an ideal forum for the analysis of the pro- and anti-competitive aspects of an agreement.[108] If this observation is correct, the AML exemptions on restrictive agreements and the future block exemption regulations can also function as a codified form of the American rule of reason since, at least from analysis on legislative language, the AML prohibition and exemption on restrictive agreements is

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[106] *Wils* (n 78) 22; Wils, *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International, The Hague 2002) Section 6.2.3.2.

[107] Wils (n 78) 6-7.

[108] European Commission, *White Paper on the Modernization of the Rules Implementing Article 81 and 82 of the EC Treaty* [1999] OJ C132/1, [1999]5 CMLR 208, paras 57 and 184 ff.

the Chinese equivalent of Article 81 EC.

However, it is noteworthy that, the CFI, in *Metropole Televisions v. Commission* and *Van de Bergh Foods v. Commission*,[109] rejected the argument that previous judgements' acceptance of economic justifications and explanations for restraints contained in an agreement is amounted to an acceptance of the rule of reason. In Metrople, the CFI held that the EC case law did not confirm the existence of a rule of reason.[110]

A noteworthy point is that, Wils' argument of 'no scope of discretionary political decisions' in the application of neither Article 81 EC nor Section 1 of the Sherman Act is problematic. Historical documents, decisional practices and case law, and literatures have all reflected 'the political content' and 'the use of discretion' in competition law and policy across jurisdictions[111].

For example, when discussing discretionary powers and exemptions, Dabbah observes that the implementation of exemptions may 'on grounds of industrial policy' and may for example 'impede the access of foreign firms to the domestic market'.[112] This observation appears to be a prediction of the AML exemptions on restrictive agreements. For example, among six recognized objectives of the first criterion of Article 15 of the AML, enhancing competitiveness of small and medium-sized undertakings, ensuring legitimate interests in foreign trade and economic cooperation, and moderating decreases in sales and production surpluses are particularly subject to political and judicial discretionary powers. Even in the future, after adaptation and narrowed interpretations, there might still scope which leaves Chinese exemption mechanism on restrictive agreements to discretionary manoeuvres. The challenging

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[109] Case T-528/93, *Metropole Television SA v. Commission* [1996] ECR II-649, [1996] 5 CMLR 386, and Case I-65/98, *Van den Bergh Food v. Commission* [2004] 4 CMLR 1.

[110] See, Case 56/65 *Societe La Technique Miniere v. Maschinebau Ulm GmbH* [1966] ECR 234, [1966] 1 CMLR 357. For more in-depth discussion on a rejection of the rule of reason in the EC and per se illegality and the rule of reason in the USA, see Jones and Sufrin (n52) pp 201-204, 613-18.

[111] Robert Pitofsky, 'The Political Content of Antitrust' 1979 (127) *University of Pennsylvania Law Review* 1051-1081.

[112] *Dabbah* (n 1) at ch 4 The Use of discretion, 70-85.

problem is not to avoid facing discretion but as commented by Dabbah, how well a particular system of competition law and the law's environment could deal with and check the use of discretion.[113]

5.4 Concluding Remarks

Ehrlich and Posner observed that

> The inherent ambiguity of language and the limitations of human foresight and knowledge limit the practical ability of the rulemaker to catalog accurately and exhaustively the circumstances that should activate the general standard. Hence the reduction of a standard to a set of rules must in practice create both overinclusion and underinclusion.[114]

This remark is particularly relevant to competition law in part because the law 'tends normally to be vague in terminology'.[115] As we can see from analyses of this chapter, although a framework on regulating restrictive agreements is established by the AML, since the framework is based on vague models of advanced competition laws and is tailored in order to transplant into a transitional China, much remains to be done. The especially complex analytical framework for restrictive agreements will require a fundamental rethink of the institutional arrangements and enforcement mechanism of the AML.

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[113] Dabbah (n 1) 76-85. See also chs 2, 3 and 8 of this thesis for detailed discussions on discretionary power which influences Chinese competition law and policy.

[114] Isaac Ehrlich and Richard A Posner, 'An Economic Analysis of Legal Rulemaking', (1974) Vol 3 No 1 *Journal of Legal Studies* 268.

[115] Dabbah (n 1) 70.

6

Abuse of Market Dominant Position

6.1 Background

Abuse of Dominance in China is reflected largely in use and abuse of administrative powers to restrict competition inherited from the pre-transitional system, as well as in economic monopolies created by the new conditions of the socialist market economy. Besides MNC, currently almost all market big-players are those large SOE, most of which are in the process of privatisation, and mostly in traditional natural monopolies such as public utilities, transport, telecommunications, etc. Therefore, one can reasonable understand that abuse of dominance in China goes hand in hand with public undertakings and the so-called 'administrative monopoly' as discussed in chapter 4 above. However, because of Article 7 of the AML and supported by their sectoral regulators, many public undertakings may easily find their leeway by claiming non-application of the AML.

Ironically, taking into consideration of the current economic situation in China, the provisions of abuse of dominant position are originally and essentially expected to mainly regulate anticompetitive acts of those which are or will be transformed from regulated state undertakings. Three examples can indicate why abuse of dominance is highly relevant to Chinese public undertakings.

The first example is the telecommunication sector. Although the creation of China Unicom in 1994 and the splitting of China Telecom, the monopolist of the industry for 45 years, have resulted in seven operators in the telecom sector, a pattern of real competition has yet to come.[1] Taking mobile phone market for example, by 2006, Hong Kong SAR, a city with a population of 6.9m and an area of 1103.72 sq km, has

[1] Qi Yudong, *Zhongguo Jingji Yunxing zhong de Longduan yu Jingzheng* (Monopolies and Competition in China's Economic Operation) (The People's Press, Beijing 2004) 291-292.

six mobile telephony companies. In the PRC, an economy with a population of 1.3b and a geographic area of 9,600,000 sq km, there are only two mobile telephony companies, China Mobile and China Unicom, which are both State-owned companies and are controlled substantially by the Ministry of Information Industry and its local agencies. The less competitive Chinese telecommunication market is full of exploitative and exclusionary practices, such as excessive pricing, tying and bundling, exclusive dealing, etc. which has led to loss of consumer welfare.[2]

The second example is the health care pharmaceutical market. On the one hand, the market share of retailing pharmacies is only 15% and mainly in non-prescriptions. On the other hand, the remaining 85% market shares are held by state-owned hospitals by selling prescriptions. In order to eliminate competition from retailing pharmacies, many hospitals engage in restrictive practice such as exclusive dealing, bid rigging, tying, etc. To exploit excessive profit, hospitals are using e-prescriptions, which force patients not only pay for consulting doctors but also purchase prescriptions through the hospital. Similar behaviour by state-owned hospitals has significantly distorted competition of pharmaceutical market and has caused the price of health care unaffordable for majority Chinese. It is very easy for a hospital to find sectoral laws and regulations as an excuse to avoid competition and, in the near future, to avoid the anti-monopoly sword.[3] Although resolving the problem depends on reforms in the health care sector and the social security system, the AML is expected to scrutinize undertakings behaviour during the ongoing reform process.

The third example is the petrochemical industry. In the year of 2005, by using their strong positions and 'the golden opportunity of energy crisis', China's top two petroleum companies, the state-owned China Petroleum & Chemical Corp (SinoPec)

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[2] Wang Junhao, The Reform Mechanism for Chinese Monopolist Sectors – A Case of Chinese Telecommunication Regulating System (2005) 1 *Zhongguo Gongye Jingji* (China Industry Economy); Shi Jianzhong, Telecommunicating Sectoral Legislations and Regulatory Policies, (2006) August *21 Shiji Jingji Baodao* (the 21st Century Economic Report).

[3] Ma Hongman, Why low price pharmacies are making big loss? *Meiri Jingji Xinwen* (Economic News Daily), 12 August 2005; — 'Yigai shinian, weihe jinban baixing kanbuqi bing?' (Health care reform 10 years on: Why nearly half citizens cannot afford seeing doctors?) at, <http://news.xinhuanet.com/comments/2004-12/16/content_2340572.htm>, 16 December 2004.

and China National Petroleum Corp (CNPC), increased their market share to 55% and 32% respectively. Their expansion strategies included hostile takeover, margin squeezing, obtaining state aids and subsidiaries, refusal to deal, production restriction and quota, and price distortion, etc. It will be very difficult to subject the Chinese petrochemical sector to the AML considering the prevailing plausible excuses such as 'national and resource security', 'strategic industry', 'national champions' and alike. Not to mention all high-profile state-owned enterprises are regulated by the newly formed but powerful State Assets Supervision and Administration Commission (SASAC) and its local bureaus focusing on industry policy and the National Plan.[4] These three examples are representative but far from exhaustive.

6.2 The Current Legal and Regulatory Framework

6.2.1 The Anti-Unfair Competition Law 1993

Regarding abuse of market dominant position, the AUCL explicitly prohibits forced transactions by public utilities and other statutory monopolists. Public utilities companies are subject to a fine between RMB 50,000 and RMB 200,000 or a fine between one to three times of the illegal gains, and order to stop the illegal behaviour.[5] The AUCL also prohibits below-cost sales (predatory pricing) and tying but does not require that a dominant market position needs to be established before assessing these two types of conduct.[6]

6.2.2 The Price Law 1997

The Price Law prohibits business operators from below-cost sales with an intention to eliminate competitors and monopolize the market. It also prohibits discriminatory pricing and excessive pricing but does not require an 'intention factor' to present. Similar to the AUCL, it is also not clear whether a dominant position need to be established prior to any substantial assessment. Offenders are subject to seizure of

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[4] See Sheng Dalin, Monopolized State-owned undertakings' takeovers of private undertakings are against the reform, *21 Shiji Xinwen* (the 21st Century News), 10 April 2006.

[5] AUCL 1993, arts 6 and 23.

[6] AUCL 1993, arts 11 and 12.

illegal gains, a fine up to five times of the illegal gains, warning, order to stop business for rectification, and/or cancelling business licenses.[7]

6.2.3 The Contract Law 1999

Relevant articles of the Contract Law on monopoly are discussed at 5.2.4 above.

6.2.4 The Provisions on Prohibiting Public Utilities to Restrict Competition 1993

Based on the AUCL, *the Provisions of Prohibiting Public Utilities to Restrict Competition* (the Public Utilities Provisions) were adopted by the SAIC in December 1993. The notion 'public utilities' refers to 'business operators in the sectors of water, electric power, gas, postal service, telecommunications, and transport, etc'.[8] They are requested to 'abide by the laws of the PRC' and are prohibited from 'using dominant position to impede fair competition of other business operators and to harm legitimate rights of consumers'.[9] A non-exhaustive list was given which illustrated prohibited restrictive behaviour, including forced transaction, tying, refusal to deal and excessive pricing.[10]

According to this writer's literature and governmental archive review, the Public Utilities Provisions were the first legislative document which introduced the concept 'dominant position' (*youshi diwei*) into the Chinese law, although a definition was not given. The concept was later developed to 'dominant market position' (*shichang zhipei diwei*) by the Monopolistic Pricing Provisions in 2003. Except these two legislative documents, the concept 'monopoly' (*duzhan* or *longduan*) has been used, for example, by the AUCL, the Price Law, and the Contract Law. The concept 'dominant market position' was formally adopted by the AML in August 2007.

Another interesting aspect of the Public Utilities Provisions is that service-users and

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[7] Price Law 1997, arts 14 (2), (5), (7) and 40.

[8] The Public Utilities Provisions 1993, art 2.

[9] Ibid, art 3. It's noteworthy that the Public Utilities Provisions 1993 do not use the concept 'abuse'.

[10] Ibid, art 4.

consumers are allowed to bring actions against public utilities and to claim compensations in accordance with rules set out by Article 20 of the AUCL. In contrast, Article 20 of the AUCL itself only allows injured business operators to sue.

6.2.5 The Interim Provisions on Prohibiting Monopolistic Pricing Behaviour 2003

As previously discussed, the *Interim Provisions on Prohibiting Monopolistic Pricing Behaviour* (the Monopolistic Pricing Provisions) prohibit controlling price through collusion or abuse of dominant market position.[11] Although 'dominant market position' is not defined, the Monopolistic Pricing Provisions provide that a dominant market position shall be determined according to 'market shares (of the business operator concerned) on the relevant market, degree of substitutability (of the product or service in question) and the difficulty of market entry to new entrants'.[12]

Business operators holding dominant market position are prohibited from four types of abusive behaviour, including, fixing resale price, excessive pricing, below-cost sales (predatory pricing), and discriminatory pricing.[13] Therefore, regarding abuse of dominance, the scope of the Monopolistic Pricing Provisions is much clearer than that of the AUCL and the Price Law. As already analyzed, the AUCL and the Price Law are silent on whether a dominant position is a prerequisite to scrutinize prohibited abusive behaviour.

6.2.6 Sectoral Regulations

Sectoral regulations discussed at 4.2.3 above, such as the postal law, the electric power law, the railway law and the telecommunication regulations, are highly relevant to rules on abuse of dominance and are therefore important components of the current legal and regulatory framework.

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[11] Monopolistic Pricing Provisions 2003, art 2; also see discussion at 5.2.6, above.

[12] Ibid, art 3.

[13] Ibid, arts 5, 6, 7, and 8.

6.3 Abuse of Market Dominant Position under the Anti-Monopoly Law 2007

6.3.1 Market Dominant Position (*Shichang Zhipei Diwei*)

The concept of dominant market position was first adopted in China by the Monopolistic Pricing Provisions in 2003, prior to which the concept of monopoly was adopted by the AUCL, the Price Law and the Contract Law in 1993, 1997 and 1999 respectively.[14] Over the years, the concept of 'dominant market position' has been developed in many aspects by the series drafts of the proposed AML. The focus of the concept has also been changed from competitors to competitive process. For example, previous drafts of the proposed AML once defined a dominant market position as 'one or more operators controlling a 'specific market' and prohibited 'abuse of a market dominant position to obstruct the activities of *other operators*'[15] Under the AML, dominant market position is understood as a position that enables undertaking(s) to control the price, product quantity or other trading conditions in the relevant market, or to restrict or affect market entries. Dominant undertakings are prohibited from abusing its dominant positions to eliminate or restrict competition.[16]

The AML have one chapter with three substantial articles to deal with abuse of dominance.[17] Based on the Article 82 EC model, the elements of a dominant position include (1) Is there a dominant market position in a relevant market? (2) Is this dominance market position held in the PRC or a substantial (any) part of it? (3) Is there an abuse of that dominant position? (4) Does this abuse eliminate or restrict competition? (5) Is there any possible objective justification for the alleged abusive behaviour?

6.3.1.1 The Market Share Presumption

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[14] See the Monopolistic Pricing Provisions, arts 2, 3, 5-8; AUCL 1993, art 6; Price Law 1997, art 14 (2); Contract Law 1999, art 329.

[15] For example, the July 2002 Draft, art 14.

[16] AML, arts 6 and 17.

[17] In ch III, arts 16-18, the AML establishes a framework to scrutinize abuse of dominance in the PRC.

In essence, the AML has chosen the EC model on defining dominance by looking at firstly market share, and secondly, other factors indicating dominance to alleviate administrative and legal difficulties.

As a starting point to assess dominance, a statutory presumptions triggered by certain market shares has been established since the 1999 Draft. Under the AML, the presumption of a dominant position arises if, in the relevant market, the market share of one undertaking reaches 50 percent or more; if the combined market share of two undertakings reaches 66 percent or more; or, if the combined market share of three undertakings reaches 75 percent or more. The AML does provide scope for rebutting market share presumptions. Moreover, no undertaking with a market share of under 10 per cent will be considered to hold a dominant position.[18]

For a possible finding of a 'joint market dominant position', the First Reading Draft deleted the inapplicable condition incorporated by the November 2005 Draft which required undertakings to prove that 'there is material competition between them'.[19] However, such a 'joint dominant market position' has caused strong criticism within and outside China. For example, the ABA Joint Comments pointed that the concept of joint dominant market position is 'contrary to prevailing norms' because 'collective dominance' concept in EC and German Competition laws further require addition evidence of coordinated conduct to be identified.[20] The concept is a controversial and problematic one if one takes a close look of the EC competition law decisional and judiciary practice.[21] The recently established Competition Commission of Singapore also provides guidance on this concept which requires that undertakings can be considered collectively dominant if they adopt a common policy (tacit coordination) in

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[18] AML, art 18.

[19] The First Reading Draft, art 14.

[20] American Bar Association (ABA), *Joint Comments on the Proposed Anti-Monopoly Law of the People's Republic of China*, <http://www.abanet.org/antitrust/at-comments/2005/07-05/abaprcat2005-2final.pdf>, May 2005, 3.

[21] See for example, *Compagnie Martime Belge Transports SA, Compagnie MaritimeBelge SA ande Dafra-lines A/S, v Commission* [2000] ECR I-1356, and, *Gencor v Commission* [1999] [ECR] II-753. See also discussion in Maher M Dabbah, *EC and UK Competition Law* (Cambridge University Press, Cambridge 2004) 587 – 590.

the relevant market.[22]

It is noteworthy that, compared with its counterpart in Chinese authentic text, the 'market share presumption' seemed as mandatory and irrefutable in the proposed law's English version. For example, Article 14 of English version of both the November 2005 and the June 2006 Draft provides that undertakings that have meet any of the thresholds will be directly considered holding a dominant market position. Critics toward the Article 14 and similar arrangement in previous drafts have come from within and outside China.[23] There were concerns as the existence of a dominant market position or high market concentration may be necessary for the exercise of market power, but is not sufficient to lead to a conclusion that dominant position exists, especially under conditions of the 'new economy'. Market shares and concentration measures are only starting points for the analysis of the competitive implication of a situation and a course of conduct. A detailed analysis is thus needed to determine what the actual state of competition in the market is.

However, this writer has found that, from 2002 to 2007, a series of drafts (Chinese authentic) including the First and the Second Reading Drafts have chosen the wording of 'undertakings ... MAY be presumed to hold a dominant market position.' The implication of the Chinese text was that the market share presumption should be a rebuttable one. Although it was uncertain why such a problematic meaning-twisted translation had existed for many years, a possible explanation was that the substantial differences between 'may' and 'can' were ignored by translators who did not understand the significance on a rebuttable and a non-rebuttable presumption in abuse of dominance context. Encouragingly, this misunderstanding which may result in future interpretative inconsistency has been avoided since the Third Reading Draft. The AML eventually makes it clear that 'an undertaking which is presumed to hold a

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[22] Competition Commission of Singapore, *Competition Commission of Singapore Guidelines 2005 on Section 47 Prohibition – Abuse of Dominant Position*, <http://www.ccs.gov.sg/CCS/Templates/PrintFriendly.aspx>, December 2005, 14.

[23] Nathan Bush, 'Refining China's Draft Anti-monopoly Law', *Global Competition Review: the Asia-Pacific Antitrust & Trade Review 2006*, (London, Law Business Research, 2006) 26; *ABA* (n 22) Joint Comments May 2005, 15-16.

dominant market position shall not be deemed as a dominant undertaking, if it can provide evidence which indicates it does not hold a dominant market position.'[24] However, whether the market share presumption will preclude a finding of 'non-dominance' below the 50% market share is uncertain at the time of writing.

6.3.1.2 Other Indicators of Dominance

In addition to the market share presumption, the AML further specifies a non-exhaustive list of illustrative factors to determine dominant market position, which includes: (1) market share of the undertaking(s) involved and competition conditions in the relevant market; (2) ability of the undertaking involved to control sales market or raw materials purchasing market; (3) financial and technical conditions of the undertaking involved; (4) the extent of dependence of other undertakings on the undertaking involved; (5) the difficulty of entering the relevant market by other undertakings. The AML also provides a sweeper clause which recognises 'other factors relating to the dominant market position of the undertaking' involved.[25] Previous chosen but now deleted 'relevant factors' include the undertaking's association condition with other undertakings and import and export conditions of the relevant market.[26] Although this list of factors is non-exhaustive, as pointed by the ABA Joint Submission 2005, a 'time element' has been missing by the AML because factors indicating dominance should be considered over a sufficient period of time in order to evaluate their competitive effect and to thus avoid unjustified regulatory interference into the marketplace.[27] This observation is of particular importance considering China as an emerging and unstable market in the process of privatization and transition.

6.3.2 Abuse (*Lanyong*)

The AML does not explicitly prohibit attempts to acquire dominant market position, but only actual abuse of a dominant position. Therefore, in essence, the AML

[24] AML, art 18.

[25] Ibid, art 18.

[26] See, for example, the July 2004 Draft, art 19 (5).

[27] *ABA* (n 21) Joint Comments, May 2005, 15.

provisions on abuse of dominant market position are clearly based on the EC as opposed to the US model.

Following the previous drafts' format, the AML provides a list of categorised abusive behaviour plus a catch-all provision without given a legal definition of 'abuse'. The specifically prohibited behaviour is illustrative and includes both exploitative and exclusionary conduct. Dominant undertakings are prohibited, without valid justifications, from carrying out excessive pricing, below-cost sales, refusals to deal, exclusive or forced dealing, tying or imposing other unreasonable transactional terms, and discriminatory dealing.[28] Under the AML, 'other abuses of dominant market position determined by the AMEA' will also be prohibited.[29] This 'catch-all' provision has been incorporated since the July 2005 Draft which has distinguished the recent drafts from the previous ones. An important question of the earlier drafts was whether those activities mentioned were meant to be all the practices that will be forbidden and it was not clear whether other types of abusive behaviour not specifically listed in the drafts will also be caught.

The absence of a definition of abuse implies that close attention must be given to future decisional practice of the AMEA and case law of the courts to ascertain how abuse of dominance will be defined and assessed under the AML. It is however too early to predicate whether the concept of abuse is an objective one relating to a dominant undertaking and to impacts on the market structure, or is a 'chameleon' adaptable for a variety of objectives. Furthermore, refusal of access to network as an application of the 'essential facilities doctrine' in the Chinese context has been deleted since the July 2005 Draft. Further limit finding an abuse to conduct 'without valid justifications' is also a recent development.[30]

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[28] AML, art 17 (1) - (6).

[29] AML, art 17(7).

[30] The April 2005 Draft, art 22.

Based on the EC model, however, the Chinese abuse of dominance regime may imply more uncertainties and discretionary powers. For example, the legal definition of 'market dominant position' of the AML implies a future interpretation difficulty of 'degree of dominance'. Future non-legislative guidance and notice are therefore needed for the sake of legal certainty. Moreover, the AML offers no any clear criteria to determine abuse with only generic descriptions such as 'unfair' and 'without valid justifications'. As recognized by EC and US competition law practice, most types of conduct covered by Article 82 EC and Section 2 Sherman Act could have both anti-competitive and pro-competitive effects and so cannot always be categorized as legal or illegal. In the PRC, apart from some cases settled under the AUCL towards abusive behaviour of public utilities and administrative monopoly, there are almost no cases as regards abuse of dominance. Future subsidiary legislation and interpretations are expected to continue following EC and other available models. In any case, the current formalistic approach of the AML is difficult to implement optimally without much more intensive legislative and non-legislative initiatives and human resources investment. Three pending cases analyzed below have reflected how far China is from an administrable approach in regulating abuse of dominance.

6.3.3 Consequences of Infringement[31]

Remedies for the infringement of rules on abuse of dominant market positions include orders to cease the conduct, confiscations of illegal gains, and fines (between 1-10 % of previous annual turnover).[32]

6.3.4 Comments

As recognized by legal scholars and practitioners, what constitutes a dominant position and an abuse of the position for competition law purposes is a complex and important threshold question. It remains to be seen how the future AMEA is about to interpret these two troublesome concepts.

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[31] See 8.4.2, below.

[32] AML, art 47.

Although improved over the years, there are still many uncertain points existing in the AML provisions on abuse of dominance. For example, the AML prohibits a business undertaking in a dominant market position from refusing to deal 'without valid justifications'. The term 'valid justifications' is not defined. In many cases involving refusals to deal, the EC and the US authorities and courts cite the presence and absence of a legitimate business interest as a controlling consideration. In the US, typically, the term 'legitimate business purpose' either means that the defendant had no anticompetitive intent, or that the challenged practice is efficient. Similarly in the EC, a refusal to deal by a dominant firm is permitted in some circumstances, namely, when there are legitimate commercial interests and any steps taken must be fair and proportionate to the threat the company faces from a competitor.[33]

In addition, regarding below-cost sales, the AML has offered no explanation on what cost level should be taken into account, how to assess the relationship between a firm's costs and prices, how to compute costs, and more formidably, how to distinguish prices that are low for predatory purposes from prices which are low but as part of pro-competitive effects. Focusing on cost levels, predatory pricing theory of the EC and US competition laws has been developed over the years via leading case laws and theoretic debates and has posed intrinsic challenges to competition authorities in both jurisdictions.[34] Transplanting such a complicated concept and theory without thorough investigation into its rationale and self-assessment on enforcement competence might render the provision inoperative in the future.

6.4 Case Study

The case study provided at this section manifests how Chinese undertakings refer to existing laws and rules to challenge alleged abusive behaviour of MNCs before the

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[33] *Commercial Solvents v Commission*, Joined Cases 6/73 and 7/73, [1974] ECR 223; Case 27/76, *United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429.

[34] Case *AKZO Chemie BV v Commission* [1991] ECR I-3359, [1993] 5 CMLR 215; Case C-333/94 P, *Tetra Pak International SA v Commission* [1996] ECR I-5951, [1997] 4 CMLR 662; *Standard Oil Co. of New Jersey v US*, 221 US 1 [1911].

promulgation of the AML. The case study also shows the gaps between the current system and an effective set of rules on abuse of dominant position.

6.4.1 The Dispute between Dongjin and Intel: Competition Law v IPR

6.4.1.1 Beijing Dongjin Xinda Technology Co. Ltd (Beijing Dongjin) v Intel Corp.: Abuse of Dominance or Infringement of IP Rights[35]

Beijing Dongjin v Intel Corp. was heard before the Beijing First Intermediate People's Court on 28 July 2006. The dispute involved a standard clause of a software license. Beijing Dongjin claimed the clause was void under Article 329 of the Contract Law of P.R. China because it illegally monopolized technology and limited technology development. Although the proposed AML has not yet been enacted at the time, the case has been referred to as China's first anti-monopoly case and as a war between 'elephant and aunt'[36], which invited widespread media comments within China.[37]

Beijing Dongjin purchased hardware product 'Intel Dialogic Board' and was supplied with driver SR5.1.1, which functioned also as application software development package from Intel in March 2005. SR5.1.1 was subject to a standard licensing agreement set by Intel, a clause of which specified that purchasers could only use the Intel software in combination with the purchased Intel hardware.

Beijing Dongjin argued that the clause created an illegal monopoly in respect of technology and, as a result, was void under Article 329 of the Contract Law, which deems contracts to be void when illegally monopolizing technology and impairing technology development. In addition, Paragraph 10 of the Interpretation of the

[35] The case analyzed here is based on the Bill of Complaint submitted by Beijing Dongjin to the Beijing First Intermediate People's Court in April 2006 and two articles, (1) Wang Xiaoyan, '*Dongjin vs Intel*: bentu qiye yu guoji longduan liliang de kangheng' (Dongjin v Intel: the contention among domestic enterprises and international monopolist powers), *Fazhi Ribao* (Legal Daily) (Beijing 25 July 2006) and, (2) Jiao Jiying, 'Dongjin fansu Intel wuguo, Intel banlai meiguo zhengren'(*Dongjin v Intel*: no outcome during the first hearing, Intel brought expert witness from the USA), *Xin Jing Bao* (The Beijing News) (Beijing 29 July 2006). No case citation is available at the time of writing.

[36] Intel and Beijing Dongjin were referred to as an 'elephant' and an 'aunt' due to the fact that the former is a successful multinational corporation with an annual turnover above USD 30 bn, the latter is a small Chinese private company with an annual turnover lower than USD 10m.

[37] — *Shijian huigu: Dongjin fansu Intel longduan de qianyinhouguo* (Review: Causes and Consequences of Dongjin's counterclaim against Intel), <http://it.people.com.cn/GB/8219/68399/68409/4621379.html> 24 July 2006.

Supreme People's Court of P.R. China Concerning Issues on the Application of Laws in Disputes over Technology Contracts identifies technology licenses which create monopolies are consequently void.[38] Beijing Dongjin further argued that the standard clause limited its rights of freedom to choose between different hardware suppliers since the implication of the standard clause was that subsequent application programme developed by purchasers will be also required to use with Intel hardware products and thus will continue to be bundled with Intel Dialogic Board. Purchasers, like Beijing Dongjin, will have to be regular costumers of Intel and cannot switch.

Intel argued that the complaint was fabricated and groundless since the principal sale was the hardware. The disputed software, as an 'extra product', was a driver programme which can be developed and used according to purchasers' specific demands. What Intel required in the standard clause was using the supplied software with Intel hardware. The lawsuit was simple a response to a dispute in 2005 in which Intel sued Shenzhen Dongjin Technology, the parent company of Beijing Dongjin, for IP rights infringement[39]. It seemed that Intel tried to avoid the word 'bundling' and did not objectively justify the clause instead by arguing that such standard clauses and contracts are 'common practice' of IT sector.

The case is pending at the time of writing.

6.4.1.2 Intel Corp. v Shenzhen Dongjin Technology (Shenzhen Dongjin): The First Case on Interoperability in the PRC[40]

It was believed that a high-profile IP rights dispute between Intel and Shenzhen Dongjin starting from the end of 2004 was a tipping point of the lawsuit brought by

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[38] According to *The Resolution of the SCNPC on Strengthening the Work of Law Interpretation* adopted in June 1981 and judiciary practice since then, judicial interpretations issued by the Supreme People's Court (SPC) of the PRC clarify laws and legal rules and have binding force to all subsidiary courts. A judicial interpretation becomes part of Chinese law upon issued.

[39] See, 6.4.1.2, below.

[40] The case analyzed here is based on three articles, (1) Wang Weiwei, '2005nian zhongwai zhishichanquan diyizhan daxiang' (The Sino-Foreign First War on IP Rights in 2005), *Zhongguo Zhishichanquan Bao* (China Intellectual Rights), 27 January 2005, (2) Ye Chengyue, '*Intel v Dongjin*: A lawsuit triggered by Intel's decreased market share in China?' *Guozhong Bao* (Guozhong Daily) (Beijing 26 January 2005) and, (3) Shi Qiushi, 'Intel claimed a $7,960,000 compensation, Chinese hi-tech companies need anti-monopoly law' *China Hi-Tech Newsletter* (Beijing 25 January 2005). No case citation is available at the time of writing.

Beijing Dongjin towards Intel in 2006.[41] On 22nd December 2004, Intel brought a lawsuit against Shenzhen Dongjin to Shenzhen Intermediate People's Court for the infringement of its IP rights. Intel claimed for damages amounting to USD 7,960,000, which was equal to the whole assets value of Shenzhen Dongjin. The hearing commenced on 23rd March 2005 and since then attracted a high level of publicity and interest in the PRC, and was thus referred to as 'the top IP rights news and disputes of 2005'.[42]

In this case, Intel claimed that a series of 'NADK' software developed by Dongjin for its DN series products since 2002 infringed Intel's copyrights of SR5.1.1 software – the driver and application programme development package for Intel Dialogic Board products.

Dongjin claimed it owned IP rights towards its independently developed DN series products (a series of analog voice processing boards, which compete directly with Intel Dialogic Board products), and the bundled NADK software. Dongjin did not illegal 'copy' Intel's SR5.1.1 software but used some interface information since the information was vital for developing DN series products. Similar to Intel's SR5.1.1, NADK was the driver and application programme development package for DN series. Since the interface information enabled NADK compatible with SR5.1.1 and thus allowed customers of Intel Dialogics Board to choose Dongjin DN series products and could still use application programme developed via SR5.1.1 without any alteration and upgrading.

Dongjin's lawyers further commented that Intel's accusation abused its IP right, took advantages of China's lack of competition law system, restricted competition, limited technology development, and attempted to eliminate competitors in the market of

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[41] Shenzhen Dongjin Technology (Shenzhen Dongjin) is the parent company of Beijing Dongjin Xinda Technology Co. Ltd (Beijing Dongjin). See, 6.4.1.1, above.

[42] —, '2005nian Zhongguo zhishichanquan shida xinwen' (Top 10 IP Rights News of China in 2005), *Zhongguo Zhishichanquan Bao* (China Intellectual Rights), 9 January 2006, available at: <http://www.sipo.gov.cn/sipo/xwdt/mtjj/2006/200601/t20060109_72841.htm>.

computer telephony integration (CTI) technology, where Intel's dominant position was challenged by rapidly increased market share of DN series products since 2002. Shenzhen Dongjin also disclosed that although the sales value of DN series was less than Intel Dialogic Board, since the price of DN series was only one third of the price of Intel Dialogic Board, the sales volume of DN series already exceeded Intel Dialogic Board. In June 2005, the second hearing was held in Shenzhen. The focus of the dispute was firstly on technology assessment and identification, and secondly, on whether interface information should be protected by IP laws. No outcome was reached.

In February 2006, an expert testimony was held in Beijing. The main findings were: NADK software incorporated some contents from the head file of SR5.1.1; The head file of SR5.1.1 included interface information; The nature of the incorporated information of SR5.1.1 in NADK further depends on the original programme; If Dongjin seeks interoperability (compatibility) between NADK and SR5.1.1, and following application programme developed by customers of Intel Dialogic Board via SR5.1.1, without other options, Dongjin has to use the identified interface information without alteration.

The case is pending at the time of writing.

6.4.2 Sichuan Dexian v Sony: Leverage Effect and Bundling of Consumables in Aftermarket[43]

In November 2004, Sichuan Dexian brought unfair competition proceedings against Sony. On 29 June 2006, the first hearing was held in Shanghai First Intermediate People's Court.

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[43] Shchuan Dexian Technologies Co. Ltd. (Sichuan Dexian) v Shanghai Sony Guangdian Electronics & Sony Corp. (Sony). Shanghai Sony Guangdai Electronics is a Joint Venture between Song Corp. and Shanghai Guangdai Group. The case facts are based on articles: (1) Zhihong Hou, 'Sichuan Dexian sued Sony in Shanghai for monopolizing behaviour' *Zhongguo Zhengquan Bao* (China Securities Daily) (Beijing, 30 June 2006) (2) Dengfeng Yan and others, 'Sony answered the accusation by explaining the necessity to protect its customers' *Meiri Jingji Xiwen* (Daily Economic News) (Beijing, 18 January 2005).

Sichuan Dexian is a lithium batteries manufacturer. It claimed that Sony applied intelligent recognizing technique to Sony digital cameras and camcorders and the bundled batteries. Since batteries of other brands cannot be used in Sony digital products without decoding, consumers of Sony digital products are thus locked with Sony batteries. Sichuan Dexian also claimed that the monopolizing behaviour of Sony was illegal since Sony abused its market dominant position, sought monopolist interests, set up technological barrier, and thus eliminated competition from batteries products of Sichuan Dexian.

Sichuan Dexian further claimed that the price differences between Sony lithium batteries and other branded lithium batteries are as significant as two to three times. For example, the current retailing market price for a Sony NP-FP90 lithium battery is RMB 890, but the price for a similar product of Sichuan Dexian is only RMB 283, which can be used in Sony digital products after decoding the products' built-in intelligent recognizing techniques. Since the average life circle for a lithium battery is one to two years, the market is a huge one. Considering the current price/quality ratio, Chinese domestic lithium battery products is better than Sony's. The technological barriers set by Sony therefore impeded consumers and Chinese lithium battery market. Except Sony's digital products, Sichuan Dexian's batteries can be used in Panasonic and JVC products. In addition, Sony set up these technical barriers only in China without similar arrangement in other countries. Sichuan Dexian further claimed that in order to decode Sony's intelligent recognizing system, it spent more than RMB 2m already, which has increased per battery cost RMB 40-50.

Sony's main point of pleading was that the arrangement was for safety reasons and thus was necessary in order to protect its customers since Sony had received several reports from it costumers that their digital products were damaged by non-Sony batteries. Sony thus chose the arrangement in order to protect its costumers form more product damages and potential physical injuries by non-Sony batteries.

The case is pending at the time of writing.

6.4.3 Comments

When commenting competition and competition law in the new economy, Peritz observes that regulators and scholars both recognize that innovation in many sectors of the new economy has a tendency to result in a new sort of monopoly, one that could lock consumers in even if better substitutes are available. Such recognition that innovation can both 'unseat monopoly and enthrone it led to closer scrutiny of competition in high technology markets'. The remaining challenging question is, submitted by Peritz, that how agencies and courts would apply old statutes and 'adapt twentieth-century economics to the new economy of the twenty-first century'.[44]

A series of significant legal and economic questions implied by the above-discussed three cases have given rise to analytical, administrative and judiciary difficulties in Chinese competition law and policy at the present and in the near future: What must the authorities identify as regards competitive effects before a dominant undertaking's behaviour could be defined as anti-competitive and thus illegal under the AML?

Questions generated by the deputes between Intel and Dongjin are as below. First of all, what is the appropriate market definition in the disputes? Is analog voice processing board and the bundled driver and application programme development package on product or two? Secondly, if it is integrated one product, do consumers and competitors have rights to disintegrate the product without infringing the producers' IPRs? Thirdly, did Intel hold a dominant position in the market of CTI (computer-telephony integration) technology, and in these two cases, in the market of analog voice processing boards (and the driver and application programme development software) in Mainland China, or any part of it, or elsewhere? Fourthly, whether interface software should be protected by IP laws? If the answer is negative, under

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[44] Rudolph J R Peritz, *Competition Policy in America, History, Rhetoric, Law* (revised edn Oxford University Press, Oxford 2000) 311.

what conditions dominant undertakings will have obligations to supply the information to competitors? In the EC, the manner of exercise of IP rights must be 'legitimate' and not a manifest attempt to frustrate competition. Meanwhile, the settled EC case law has established strict criteria for mandatory licensing under Article 82.[45] For example, in *Magill*, the ECJ stressed that because the exclusive right of reproduction formed part of an author's copyright, a refusal to grant a licence by an undertaking holding a dominant position would not *in itself* constitute an abuse. It could, however, do so in 'exceptional circumstances'. The ECJ held that a refusal to grant a licence to reproduce materials will infringe the competition rules only where the owner of the copyright holds a 'dominant position'. The ECJ further stressed that the exercise of IPRs would be reviewed under Article 82 EC only in 'exceptional circumstance'. This is to say, the norm under the EC competition is that a refusal to license does not constitute an abuse of a dominant position. The 'exceptional circumstances' in *Magill* were that the refusal prevented the appearance of a new product and there were demand for such new product. Although the EC case-law provides narrowed analytical steps, one question raised from the Magill case is that it might be difficult to establish if an undertaking seeking a licence from another is aiming to offer an identical or different product or service from that offered by the IP right holder.[46] Therefore, where could China strike a fine balance between IPRs protection and competition policy? Is there any possibility to establish criteria as legal basis on which mandatory licensing of IPRs can be required under the AML? The Fifth question is did Intel abuse its dominant position by refusing to supply interface information to its competitors? Similar to some substantial aspects of *Microsoft Corp. v Commission* in the EC, whether the interface information held by Intel was truly indispensable for Dongjin? If yes, whether the legitimate interest of Intel in protecting its valuable intellectual property rights might objectively justify the refusal? Is there any need to take into consideration of the value of the investment involved in developing Intel Dialogic Board and SR5.1.1, and the value

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[45] See Case No COMP/37.792 *Microsoft* of 24 March 2004; Joined Cases C-241/91 P and C-242/P *Magill*; Case C-418/01 *IMS Health*.

[46] Alison Jones and Brenda Sufrin, *EC Competition Law: Text, Cases, and Materials* (2nd end Oxford University Press, Oxford 2004) 763-769; and, David Aitman and Alison Jones, 'Compctition Law and Copyright: Has the Copyright Owner Lost the Ability to Control his Copyright? (2004) *European Intellectual Property Review* 137-147.

that would be transferred to rivals by disclosure?[47] Finally, did Intel abuse its dominant position by setting compulsory obligations to prohibit disintegration of the driver and application programme development package (SR5.1.1) with the main product (Intel Dialogic Board) but allow users to modify or develop SR5.1.1 for its own needs?

Questions raised by *Sichuan Dexian v Sony* are also difficult to answer. Did Sony hold a dominant market position in the market(s) for digital cameras and/or camcorders in Mainland China, or substantial (any) part of it, or elsewhere? Whether the primary market, the market(s) for digital cameras and/or camcorders is competitive? Is there a separate market of lithium batteries for Sony digital products? If yes, did Sony hold a dominant market position in that 'aftermarket'? Whether competition in the market of batteries for digital products increasingly takes place at the time of the original digital products sale? What are the possibility and the exact cost for consumers of Sony digital cameras and/or camcorders to switch to batteries of other producers? Is it possible for consumers to switch to another digital cameras and/or camcorders and thus avoid the higher price of consumables, namely, Sony lithium batteries? How much is life cycle cost for a digital camera or camcorder and the requested batteries? Furthermore, whether there is sufficient information available to consumers in order to carry out such a 'life cycle cost' calculation? Did Sony abuse its dominant position in the market of digital cameras and/or camcorders, and/or the market of requested lithium batteries (if there is a defined separate market) by its behaviour of setting technological barriers in order to reserve the market and to exclude competitors? Did Sony's technological barriers setting behaviour likely to have a market distorting foreclosure effect? Did the pricing of Sony's lithium batteries excessive and thus has an exploitative effect? Is there any objectively justified reason for Sony's behaviour? Who should conduct the assessment towards Sony's counterclaim based on the reason of safety? In the EC, decisional practice of the Commission and settled case law of the Courts have clarified that it is not the task of a dominant undertaking to take its own

[47] Case T-210/04 R, *Microsoft Corporation v Commission.*

initiative to 'eliminate products which it regards, rightly or wrongly, as dangerous or inferior to its own products.'[48]

6.5 Concluding Remarks

First of all, lack of a systematic competition law as a legal basis for China to regulate anti-competitive behaviour and structures has caused more concerns in areas of abuse of dominance and restrictive agreements than in merger control regime. The latter, although far from optimal, is currently regulated by numerous sectoral and specific laws, regulations and rules. Comments by two officials of the Anti-monopoly Investigation Office (AMIO) of the Ministry of Commerce (MOFCOM) demonstrated how difficult it is for anti-monopoly investigation and litigation to be conducted in China without the AML. In an interview regarding the case Sichuan Dexian v Sony, two officials of the MOFCOM disclosed that since the proposed AML has not yet been enacted, there was no formal procedure for the AMIO to follow. What situation can trigger an anti-monopoly investigation is uncertain such as whether an investigation can start after a complaint or the AMIO can take its own initiative are all uncertain at the moment. Also there are obvious difficulties to define monopolist behaviour or abuse of dominance as the substantial law is also lacking detailed guidance. Legal scholars and practitioners further expressed their concerns on the undesirable position of Dongjin and Sichuan Dexian of challenging multinationals' possible anti-competitive behaviour without a clear legal basis to rely on. Both the officials and the scholars supported the necessity and timeliness for enacting the proposed AML.[49]

Secondly, any abuse of dominant market position under the AML could be defined and assessed only after a very close and careful scrutiny of the factual, economic, and legal context, and based on a case-by-case analysis. There is no exception for the PRC.

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[48] See Case I-30/89, *Hilti v Commission* [1991] EC II-1439, [1992] 4 CMLR 16, and, DG Competition discussion paper on the application of Article 82 of EC, 60.

[49] The facts of this paragraph is based on an article by Xiouzhong Li, 'Sony's technological barrier suspected for monopolizing' *Diyi Caiying Ribo* (The First Financial & Economy Daily) (Beijing, 17 January 2005).

However, the task is a particularly demanding one. Technical assistance from advanced competition law jurisdictions and thorough comparative research and precise translation are urgently required for China to establish an administrable approach on area of abuse of dominance. Furthermore, future published guidance and notices are a must in order to clarify uncertainties under the framework of the AML.

Thirdly, the above-discussed three pending cases demonstrated that behaviour of undertakings of (possible) dominant position is the best incentive which attracts new entries. The long term market tends to be competitive, at least in theory, and there is no exception in Mainland China. When and how should competition law to be referred to is a tough question, which is even tougher for Mainland China. Sound competition policy is a moving target, as former Deputy US Attorney General William Baxter suggested that competition policy should be 'based on whatever it is we know at any particular moment about the economics of industrial organization'. So the laws have to be adapted through reinterpretation and revision according to economic theory, market fact, and technology development.

Finally, would the current EC modernization of Article 82 offer any relevant experience to the PRC? Any lessons could learn from comparative research into East Asian competition laws? How to identify the implications of the current form based and the possible effect based approaches to the business, the officials, and customers both in the EC and in the PRC. Would an effect-based approach be more desirable than a form based approach but also realistic? For example, a cost-based assessment with a premise that only conduct which would exclude an 'as efficient competition' may be more administrable in Chinese context. Could there be any possible defences based on objective justifications such as the efficiency defence available to parties? Finally, what obstacles China needs to overcome in order to establish a transparent and workable approach in abuse of dominance cases in particular, and in all areas of competition law in general are waiting to be addressed.

7

Merger Control

This chapter focuses on the Chinese merger control law developments and presents it in the broader context of the PRC regulatory reform in the post-1990s. It reviews the current legal and regulatory framework based on the M&A Rules and assesses procedural and substantial rules under the AML. The primary purpose of this chapter is to observe tensions in modern merger analysis in the Chinese context. This writer proposes a patient but dynamic approach when observing the interface between merger control law and industry policy and the ongoing rivalry between reformists, protectionists and techno-nationalists in China.

7.1 Background

7.1.1 The Accelerating Industry Consolidations: Political Signals and Market Climate

As a strategy to acquire managerial and technical talents, to acquire economies of scale and scope, and to increase market share, cross-border and purely domestic M&A have become widespread in China over the years. The years 2006 and 2007 have particular significance in the Chinese M&A regulatory history. Five-year plans and annual government work reports are among the most important official documents that set forth guiding principles and main tasks for the PRC, and thus dictate its economical, political and social developments.[1] Messages from *the 2006 Government Work Report* (the Government Report) and the *11th Five-Year Plan for National Economic and Social Development (2006-2010)* (the 11th Five-Year Plan) provided indicators of accelerating industry consolidations and therefore have substantial impacts on M&A

[1] China's economic system was modeled on the Soviet Russian centrally planned economy. Under such a system, the Central Government released the State Plan, namely, the Five-Year Plan, as the goals and directions of the country's economic development. After adopting a socialist market economy, the Five-Year Plan only provides macroscopic development goals and policies for national economic and social developments.

regulations and landscapes.[2]

The Government Report emphasized that reforming and restructuring state-owned enterprises (SOE) and upgrading industry are pressing tasks for China. In order to complete these tasks, the government will apply economic, legal and administrative measures and take full advantage of the market mechanism.[3] The Government Report declared that the tasks have wide implications and involve policy considerations. This document further indicated that, to encourage concentrations and to facilitate domestic enterprises growing stronger, the government will close down enterprises in capacity surplus sectors, control further expansion of production capacity, and support M&A, joint ventures and other cooperative agreements between enterprises. Furthermore, the government will continue to promote the open-up policy and to support domestic enterprises competing globally and using foreign capitals effectively.

To supplement the Government Report, the State Council published an 'Interpretation' and went further by declaring that the government will encourage cross-region and cross-sector concentrations by flagship corporations.[4] The Interpretation illustrated the fragmented domestic market by referring to the steel, cement, chemicals, coal, electricity, motor vehicle, and textile sectors since these sectors have been troubled by inferior technology, out-of-date management system and capacity surplus. The Interpretation declared that the PRC will have several large combinations in the steel sector, each with an annual capacity of over 30m tons during the peoriod of the 11th Five-Year Plan. The document further indicated that the government will balance absorbing FDI with improved competitiveness of domestic enterprises. It particularly emphasized that M&A should be an important approach and should become a new

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[2] The two documents were approved by the 4th Session of the 10th NPC in March 2006. English version of the 2006 Government Work Report is available at: <http://english.gov.cn/official/2006-03/14/content_227248.htm>. No official English version of the 11th Five-Year Plan is available but its outlines (in English) can be viewed at <http://english.gov.cn/2006-03/23/content_234832.htm>.

[3] Sections 2 and 3 of Part I and Sections 3 and 6 of Part II of the Government Report.

[4] See *The Interpretation of the 2006 Government Work Report* issued by the Research Office of the State Council (the Interpretation) in March 2006. No official English version of the Interpretation is available.

focus of absorbing FDI. The government will actively promote cross-border M&A to reorganize SOE and SOA. Banking, insurance, securities, and distribution sectors will gradually open to WFOE or those with controlling interests by foreign investors. Parties will be permitted to evaluate assets and to decide transaction values conforming to the accepted international practice and market principles. Furthermore, to improve the current regulatory framework, the government will simplify and formulize administrative approval procedure and increase transparency. The PRC will continue to establish systematic competition policy and to improve regulatory framework on reviewing M&A and other competitive activities in order to prohibit monopolizing behaviour and unfair competition. The 11th Five-Year Plan emphasized and explained the above-mentioned missions in great detail.[5] Therefore, one can reasonably predict that the sustained M&A waves after 1990s, often supported by Chinese government, will continue in the next decade or so.

Ambitious Chinese officials and entrepreneurs have acted swiftly according to the spirit of the 2006 Government Work Report and the 11th Five-Year Plan. Several high-profile M&A deals have gained widespread media coverage since then. The powerful consolidation trend in the Chinese market started from major initiatives of the central and local governments. Just before the 4th Session of the 10th NPC, the State Council issued *Several Opinions on Accelerating Developments in the Equipment Manufacturing Sector*.[6] In March 2006, the State Council issued the *Circular on Accelerating Restructure of Capacity Surplus Sectors*.[7] Both documents specifically emphasized M&A and stated that the government will support successful enterprises and close down loss-makers.

Since April 2006, the NDRC and other seven ministerial-level agencies have led a structural reform in the cement sector. The NDRC stated that the central government

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[5] See chs 1, 3, 4, 8 and 9 of the 11th Five Year Plan 'Guiding Principles and Development Objectives', 'Optimizing and Upgrading Industrial Structure', 'Accelerating Developments in Service Sectors', 'Furthering Institutional Reform' and 'Implementing a Mutually Beneficial Open-up Strategy'.

[6] Guo Fa [2006] No. 8.

[7] Guo Fa [2006] No. 11.

aimed, by 2010, the capacity of the cement sector will reach 1.25 billion tons per year and the numbers of cement producers will be reduced from the current 5,100 to 3,500. To achieve this objective, the government will close down many small cement producers or merge them with larger ones. Furthermore, the central government will choose ten cement producers and will support these 'national champions' to compete globally through measures such as M&A, project approving, planning permission and acquiring finance. The central government will further allocate other 30 cement producers to be support by relevant local governments.[8]

In July 2006, the Shangdong SASAC announced its plan to merge China's seventh largest steel company, Laiwu, with the sixth-placed Jinan. The two SOEs are both located in Shandong province. The transaction was expected to create the second-largest domestic steelmaker with a post-merger annual capacity of 20.76m tons just behind Baosteel in Shanghai, which has an annual capacity of 22.73m tons. Shangdong SASAC officials stated the post-merger Laiwu and Jinan will eventually meet the central government's 30m tons target set up for each national champion in the steel sector.[9]

In August 2006, the M&A Rules, which replaced the Interim M&A Rules, were issued. The latter had been in force since 2003.[10] In June 2006, June and August 2007, the long-awaited proposed AML was read the three times at the 10th SCNPC.

Considering the above-mentioned pro concentration signals from Beijing and from the Chinese market, it seems M&A is and will continue to be a major propeller of China's economic restructuring process. Statistics was also encouraging. According to PricewaterhouseCoopers and M&A Asia, there were USD 46 billion of inbound and

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[8] Ji Fagai Yunxing [2006] No. 609, 'Several Opinions on Accelerating Structural Reform of Cement Sector', issued by the SDRC, MOF, MOC (Ministry of Construction), MOFCOM, etc. in April 2006.

[9] Shanghai Zhengquan Bao (Shanghai Securities), 'Shangdong yu zhenghe jigang laigang, mouhua guonei zuida gantie hebing jihua' (Shangdong is planning the biggest merger in the steel sector), 28 July 2006, available at: <http://qdtb.mofcom.gov.cn/aarticle/shangwxw/zonghsw/200607/20060702744467.html>.

[10] See discussion in 7.2.2, below.

domestic M&A transactions in 2005, up 34% from 2004, outbound deals accounted for another $7 billion. Furthermore, an estimated 4,000 to 5,000 SOE are privatized each year out of a total remaining stock of roughly 135,000.[11] One could reasonably conclude that the major task of Chinese merger control law is to set up a fundamental pillar of a comprehensive competition code and should not function as an undue instrument to deter M&A. However, non-economic factors also impact the Chinese merger control law and M&A in China can be intensively political.

7.1.2 National (Economic) Security v Foreign Control

7.1.2.1 The Growing Sentiments of Protectionism

A May 2004 report entitled 'The Competition-restrictive Behaviour of Multinational Companies in China and the Counter Measures' has fueled nationwide opposition towards MNC. The report, issued by the Fair Trading Bureau of the State Administration for Industry and Commerce (SAIC), was based on a one-year research project. In this report, markets of camera films, cameras, aseptic packaging, software, soft drinks, tyres, mobile phones, retailing, etc. were mentioned as examples of MNC monopolies in the Chinese market.

The report stated, for example, in the camera film market, Eastman Kodak, Fuji, and Konica collectively have a market share above 80%, among which Eastman Kodak has a share of more than 50%. The only domestic brand is Lucky Film, which has a share of only 15%. In October 2003, Eastman Kodak further strengthened its dominant position by acquiring 20% share of Lucky Film at a price of USD 450 million, a product line and certain know-how. This transaction also increased suspicion of the possibility of a price cartel or other collusions between Kodak and Lucky Film. In markets of aseptic packaging and operating system software, Tetra Pak and Microsoft are two quasi-monopolists, each with a market share above 95%. The market for supporting software is also dominated by MNC.[12] Replying these criticisms, the

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[11] These data were quoted in Tyrrell Levine and Kim Woodard, 'The New Face of Chinese M&A' (2006) April Issue *Far Eastern Economic Review.*

[12] The Fair Trading Office of the SAIC, 'Zaihua kuaguo gongsi xianzhi jingzheng xingwei biaoxian ji duice' (Restrictive Behaviour of Multinational Corporations in China and Counter Measures) (2005) May Issue *Journal of*

involved MNC defended themselves and claimed they were innocent, were not monopolizing market but doing business by good practice and normal competitive conduct.[13] Trenchant comments also came from outside China. For example, Williams criticized that, 'the SAIC does not really understand the nature of market competition.'[14]

However, the influence of this report appears lingering with support from many slanted articles on MNC that helped to embellish the story. Headlines such as 'M&A waves leading by international crocodiles', 'malicious M&A by foreign private equities and investment banks', 'monopolizing M&A threatening national security' have since then appeared in leading newspapers and websites. One could almost hear the collective gnashing of teeth in China.[15]

During the 4th Session of the 10th NPC in March 2006, criticism towards M&A by foreign investors rose to its zenith and produced the strongest reaction in recent years. A motion moved by All-China Federation of Industry and Commerce (ACFIC) suggested that the central government should establish a national economic security system. The ACFIC report stated that cross-border M&A was a significant phenomenon of a globalized era, and was a necessary path for enterprises and countries to integrate into the global markets. However, when MNC increased their market shares and dominated domestic markets, national economy was always encroached and economic security threatened. The ACFIC motion suggested the proposed AML should be enacted as soon as possible and meanwhile the PRC should establish a national economic security system.

Administration of Industry and Commerce; Xinwen Chengbao (Morning News), 'Guojia gongshangzongju baogao: Kuaguo jutou zaihua jianxian longduan taishi'(Report by the SAIC: Multinational giants to show signs of monopoly in the Chinese market step by step) 15 November 2004, <http://news.xinhuanet.com/fortune/2004-11/15/content_2221465.htm>; Lin Hua, 'Kuaguo gongsi zhengde zai gao longduan ma?'(Are multinationals really monopolizing the market?) (2005) 1 MOFCOM: *Zongguo Waizi* (Foreign Investment in China).

[13] See ch 6, above for more detailed analysis on this report.

[14] Mark Williams, *Competition Policy and Law in China, Hong Kong, and Taiwan* (Cambridge University Press, Cambridge 2005) 213-214.

[15] The term 'crocodiles' refer to certain hedge funds that were perceived to damage Asian currencies and cause regional financial crisis in 1997.

Similar comments were also made by other top officials. Premier Wen Jiabao stated that, in the process of further integrating China into the world market, the country must pay particular attention to economic security. In his report, Ma Kai, Chairman of the NDRC, stated that in order to protect Chinese industries, the government should guide foreign investment to certain industries and regions, and improve and standardize policies related to takeovers. Li Deshui, Chief Commissioner of the National Bureau of Statistics (NBS), claimed that there should be stringent measures to regulate and punish hostile takeovers by foreign investors that target promising domestic companies and aim to monopolize the Chinese market. When explaining the proposed AML during the session, Cao Kangtai, director of the Legislative Affairs Office of the State Council (LAOSC), stated that, 'With frequent M&A and restructuring activities by foreign investors, monopolies are emerging in some areas and in certain industries. This is why an anti-monopoly law is essential.'[16]

The warfare towards M&A by foreign investors is by no means unique to China. Even Chinese officials' mixed attitudes with a certain degree of self-contradiction are understandable. Officials have been reluctant to risk themselves to negative political repercussions from selling national industries to foreigners.[17]

7.1.2.2 Triggering Factors

7.1.2.2.1 Failed Outbound Acquisitions by Chinese Enterprises

A chain of events has contributed to the current situation. One of the major tipping points was resentment over a failed USD 18 billion bid by China National Offshore Oil Co. (CNOOC), a giant SOE, for a California-based petroleum producer Unocal in 2005. The deal would have been the biggest Chinese outbound acquisition but it collapsed mainly because of the rejection by the US Congress based on concerns of

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[16] Information of this paragraph is based on a series of archives and documents of the 4th Session of the 10th NPC. Some of them are available at <http://www.npc.gov.cn/dbdh/home/index.jsp?hyid=011004_____>, (in Chinese).

[17] David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1st paperback edn Oxford University Press, Oxford 2001), 179-80.

'energy security'. CNOOC's rival US bidder Chevron eventually won. In a statement made by CNOOC in August 2005, the company expressed its regret to withdraw the bid due to 'unreasonable political obstacles' from the USA.[18] This episode has caused strong backlash in China since then. In early 2007, Mr Fu Chengyu, chairman of CNOOC, claimed that protectionism in US-led developed countries has spread worldwide.[19]

Information asymmetry in the process of China International Marine Containers (CIMC) attempt to acquire BURG Group[20] has generated suspicion about the impartiality of the EC merger control regime among Chinese.[21] Furthermore, a protectionist backlash in response to the US and EU anti-dumping and other trade remedied against low-cost Chinese exports have damaged the trade relations.[22]

7.1.2.2.2 Disappearing Chinese Brands and State-owned Assets

A series of M&A (closed or proposed) by foreign investors have further contributed to concerns in China relating to the impact of M&A on Chinese brands. These transactions include Morgan Stanley and others to acquire Nanfu Battery, Kodak to acquire Lucky Film, Carlyle to acquire Xugong, Caterpillar Group to acquire Xiagong, Schaeffler Group to acquire whole control of Luoyang Bearing Group, and Johnson and Johnson to acquire DaBao, etc.

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[18] China Enterprise Confederation & China Enterprises Directors Association (CEC-CEDA), 'Zhonghaiyou chexiao shougou Unocal' (CNOOC to withdrew takeover bid for Unocal), 2 August 2005, <http://www.cec-ceda.org.cn/channel/qygjjg/contents/1064.html>.

[19] Tom Mitchell and Robin Kwong, 'CNOOC chief decries spread of protectionism' *Financial Times* (London 30 March 2007).

[20] Case COMP/M.4009, *CIMC/BURG*. The proposed transaction was notified to the EC Commission in February 2006 and entered the Phase I and then the Phase II investigation. The inquiry was closed in July 2006 after CIMC abandoned its plan to acquire BURG. See European Commission (2006), 'Mergers: Commission closes inquiry after China International Marine Containers abandons acquisition of control over the Burg Group', <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1062>.

[21] Negative comments on the outcome of CIMC/BURG appeared in domestic media, such as, Huang Hai and others, 'Zhongji jituan shougou Helan BURG shouzu, mianlin Oumeng fanlunduan diaocha' (CIMC to acquire BURG is under antitrust attack from the EC Commission) *Diyi Caijing Ribao* (China CBN) (Beijing, 15 March 2006), and, Zou Yu and others, 'Zhongji shougou zao Oumeng fanlongduan diaochao, buduideng shangye bilei xianxian' (CIMC to acquire BURG: unequal business barrier is emerging) *21 Shiji Jingji Baodao* (21st Century Business Herald) (Beijing, 16 March 2006).

[22] Raphael Minder & Andrew Yeh, 'Beijing warns EU over duty on shoes' *Financial Times* (London, 10 March 2006).

An abandoned transaction has also been the focus of media and the public attention. In July 2006, a USD 600m deal which would have granted CVC Asia Pacific, a Citigroup-backed private equity fund, a 30 per cent stake in Shangdong Chenming Paper (Chenming), was withdrawn. Chenming is a listed top paper maker in China. Although CVC stated that the collapse was not because of government opposition or regulatory obstacle,[23] Chinese analysts claimed that, the more probably reason was that if successful, the transaction would enable CVC to become Chenming's controlling shareholder by increasing its share to 45 per cent in a short time. The implication was that foreigners would control this 'top one'. The current controlling shareholder of Chenming is Shouguang SASAC, the local bureau of the SASAC in Shangdong province.[24] In fact, since late 2005, almost every sector can be linked with 'national security' or 'national economic security' in the hands of anti-foreign 'red guards'.

7.1.2.3 The ACFIC Motion to Establish a National Economic Security System

Suppose a national (economic) security system is imperative for China, the tougher job followed is how to design such a system, how to clarify its relationship with competition law, and how to manage the interface subsequently.

The ACFIC submitted four key points in its *Motion to Establish National Economic Security System*, which included: (1) The NPC should set up a research institution on economic security legislation and a panel to responsible for drafting laws on economic security. The proposed AML should be enacted as soon as possible. Meanwhile, the SC should implement interim provisions on economic security prior to the enactment of the economic security law and the AML in order to regulate the current situation. (2) The SC should set up a National Economic Security Review Commission, which should be authorized to review investment and operational actions involving economic

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[23] Mure Dickie, 'CVC says "China did not scupper deal"' *Financial Times* (London, 1 August 2006).

[24] Kang Shuwei, 'Tanpan wuguo, CVC wuyuan G Chenming kongzhiquan' (Negotiation without outcome, CVC has no chance to control G Chenming) *Zhongguo Zhengquan Bao* (China Securities Journal) (Beijing, 30 July 2006), <http://www.cs.com.cn/ssgs/02/200607/t20060730_970195.htm>.

security concerns. Furthermore, relevant ministries, commissions and other regulators, such as the NDRC and the People's Bank, should also establish economic security review organisations respectively. These organisations should review related issues fall within their remit and should coordinate with the National Economic Security Review Commission. (3) Establishing a China oversea investment security system. (4) Imposing mandatory provisions to regulate M&A activities of investment banks and other financial institutions. When M&A involves Chinese enterprises, the parties must also employ Chinese professional service agencies to take part in the transaction.[25]

7.1.2.4 Criticism

This writer's opinion is that the ACFIC suggested key points are problematic because a potentially powerful, discretionary, overlapping, and decentralized national economic security system may do more harm than good. Furthermore, the current regulatory environment may become tougher accordingly.

First, the ACFIC avoided defining the term of 'national economic security' or was unable to define it, which, however, has triggered controversies and will continue to cause disputes in the future. Furthermore, a logical presumption from the first key point is that the law on national economic security and the proposed AML are categorized as basic laws (at the same hierarchal level) and will both deal with economic security issue. This writer is not arguing that 'national (economic) security' is of no significance and competition law is controlled exclusively by economic efficiencies. As discussed in Chapter 3, above, this writer agrees with the view that the direct objectives of competition include protecting competitive process, promoting economic efficiency, and maximizing consumer welfare. On the other hand, depending on each jurisdiction's stage of development and ideologist choices, the ultimate objectives of competition law are more diversified that may include commitments to fairness, market integration, democratic process and free enterprise, etc,[26] However, as

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[25] *China Enterprise Confederation & China Enterprises Directors Association (CEC-CEDA)* (n 18).

[26] See discussion at 3.3 above.

observed by Robert Pitofsky in 1979, a non-economic dimension to competition law 'should be as specific as possible about those concerns' that would be included in 'an enforcement equation.'[27]

Is the recent Chinese campaign on national (economic) security issues of M&A by foreigners substantially different with issues that have arisen over the years in other jurisdictions? The answer should be no. From what have discussed above, the national (economic) security concern in China is a mixture of legitimate interest of national security and of divergent interests of populism and protectionism in disguise. This writer's observation is that competition review of M&A based on such diverging interests could mean that the AML may provide a basis for discrimination and protectionism rather than a tool to protect competition. In certain case, such a mechanism may violate China's WTO accession commitment, result in backlash in other countries, and by no means be rewarding to the competitiveness of Chinese business and industry. Furthermore, these diverged interests have indicated a strong tendency for Chinese competition law and policy to become another heavy hand of government intervention into marketplace. Such a tendency returns the current analysis to a generic question of objectives of competition law and policy, which will not be further discussed here.[28] Regarding the 'legitimate interest of national security', this writer argues that competition law is not a suitable vehicle to deal with these concerns. The national security issue should be tackled by mechanisms focusing on political concerns and different rationales and techniques.

7.1.2.5 The CFIUS and the Exon-Florio Provision: a Model for China?

7.1.2.5.1 Lessons from the CFIUS and the Exon-Florio Provision

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[27] Robert Pitofsky, 'The Political Content of Antitrust' (1979) 127 *University of Pennsylvania Law Review* 1051, at pp 1052 and 1058.

[28] See discussion in ch 3, above.

Bearing in mind that the PRC and the USA are under significantly different socio-political context, the Committee of Foreign Investment in the United States (CFIUS) and the Exon-Florio provision may provide the PRC with a possible model. The PRC could use the rationales behind such model to deal with national security concerns more appropriately.[29] First, from a technical perspective, the commissionership, procedure, duties and powers of the US system are relevant and could be borrowed by the PRC. Second, as discussed at 7.1.2.3 and 7.1.2.4, above, the ACFIC motion to establish a national economic security system does not define what it is meant by 'national economic security' and it seems that the only manifest consideration is that the take-over party is 'foreign'. On the contrary, the CFIUS mechanism and the Exon-Florio provision provide much clearly defined factors that may be taken into account to determine the possible effects of a foreign acquisition on 'national security'.

Moreover, the US model is worth to be closely observed for broader policy considerations, including the interface between competition policy and general FDI policy, and between competition, employment and competitiveness, etc. The effects of FDI on the US economy, the legislative history, implementing experience, amendment efforts on the increasingly politicized Exon-Florio provision, and the USA's reaction towards national security implications of FDI from China from 2005 onwards could offer valuable lessons to the PRC.[30]

7.1.2.5.2 The Exon-Florio Provision and its Implementing Mechanism

The Exon-Florio provision is implemented within the context of open investment policy of the USA that grants nondiscriminatory treatment with limited exception to foreign investors. The rationale of the provision is not to discourage FDI generally, but to provide a mechanism to review and, if the President finds necessary, to restrict FDI

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[29] Analysis of this section is based on information of the CFIUS, available at: <http://www.ustreas.gov/offices/international-affairs/exon-florio/>.

[30] For detailed examination on the CFIUS and the Exon-Florio provision, see, E M Graham and D M Marchick, *US National Security and Foreign Direct Investment* (Institute for International Economics, Washington DC, 2006).

that threatens the national security.[31] The Exon-Florio provision is implemented by the CFIUS, an inter-agency committee chaired by the Secretary of Treasury.[32] The CFIUS was originally established in 1975 mainly to monitor and evaluate the impact of foreign investment in the USA. In 1988, the President delegated to CFIUS his responsibilities to receive notices of foreign acquisitions of US companies, to determine whether a particular acquisition has national security issues sufficient to warrant an investigation and to undertake an investigation, if necessary, under the Exon-Florio provision. This order also provides for CFIUS to submit a report and recommendation to the President at the conclusion of an investigation. CFIUS seeks to serve U.S. investment policy through detailed reviews that protect national security while maintaining the credibility of open investment policy and preserving the confidence of foreign investors in the USA and of US investors abroad that they will not be subject to retaliatory discrimination.

7.1.2.5.3 How the Exon-Florio Provision Identifies National Security Issues Raised from FDI: Factors to be Considered

The Exon-Florio regulations do not define national security. The preamble to the regulations provides guidance that products, services and technologies important to US defence requirements would be significant to national security. Exon-Florio provision provides authority to the President to suspend or prohibit any foreign acquisition, merger or takeover of a US enterprise that is determined to threaten the national security of the United States. The President can exercise this authority to block a foreign acquisition of a US enterprise only if he finds: (1) there is credible evidence that the foreign entity exercising control might take action that threatens national

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[31] Section 5021 of the Omnibus Trade and Competitiveness Act of 1988 amended Section 721 of the Defense Production Act of 1950 (also known as the 'Exon-Florio provision').

[32] Currently, the CFIUS has twelve members under the chairmanship of the Secretary of Treasury. The other eleven members of the CFIUS include the Secretaries of States, Defense, Commerce, and Department of Homeland Security, the Attorney General, the Director of the Office of management and Budget and of Science and Technology Policy, the U.S. Trade Representative, the Chairman of Council of Economic Advisers, the Assistant to the President for National Security Affairs and the Assistant to the President for Economic Policy.

security, and, (2) the provisions of law, other than the International Emergency Economic Powers Act do not provide adequate and appropriate authority to protect the national security. To assist in making this determination, Exon-Florio provision provides for the President or his designee to receive written notice of an acquisition, merger or takeover of a US corporation by a foreign entity. Once the CFIUS has received a complete notification, it begins a thorough review of the notified transaction. In some cases, it is necessary to undertake an extended review or investigation. An investigation, if necessary, must begin no later than 30 days after receipt of a notice. Any investigation is required to end within 45 days.

The Exon-Florio provision lists the following factors that the President or the President's designee may consider in determining the effects of a foreign acquisition on national security. These factors are: (1) domestic production needed for projected national defence requirements; (2) the capability and capacity of domestic industries to meet national defence requirements, including the availability of human resources, products, technology, materials, and other supplies and services; (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the US to meet the requirements of national security; (4) the potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and (5) the potential effects of the transaction on U.S. technological leadership in areas affecting US national security. The Exon-Florio provision also provided that the President should introduce implementing regulations. These regulations were issued in 1991. They set up a voluntary system of notification with the possibility of CFIUS member-agency notice for non-notified transactions. The President retains full authority to protect the national security with respect to any acquisition covered by this statute, regardless of whether the parties file a notification.

7.1.2.6 Comments

This writer's observation is that legal standards for reviewing M&A within the realm of competition law, including notification thresholds and substantive appraisal tests, should be non-discriminationary for both purely domestic transactions and transactions involving foreign parties. Competition law is not a suitble vechicle to deal with concerns of national security or the so-called national economic security, which can possibly be resolved by establishing a carefully designed reviewing mechenism according to the reality of China and by studying experience of other jurisdictions. However, the long-term political pressures and the old, bankrupt ideology of revolution and cold war behind the slogan of national (economic) security is too obvious to be ignored which might, to a great extent, compromise the efficiency of any mechanism on this issue. Finally, a fundamental point which is always be ignored by policymakers and the public is that, competition and competition-related legal and regulatory instruments are not ends in themselves. Furthermore, competitiveness cannot be secured by economic nationalism and protectionism. Status quo of M&A and merger control in China have narrated a story of how easily for interest-diverged groups to abuse these instruments, no matter consciously, subconsciously, or unconsciously.[33]

7.2 The Current Legal and Regulatory Framework: Implications and Interactions

The Chinese regulatory framework on M&A transactions was established in the 1990s. The concept of merger first appeared in 1986 in an experimental local regulation for foreign-invested enterprises. Following this document, some basic stipulations regarding approval procedure and transfer of equity interest were provided by local foreign investment regulations.[34] The concept of merger was introduced nationally by

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[33] It has been observed that various economic, political, and legal constraints peculiar to emerging economies then to impose the risk that competition policy will be abused. See Williams H. Page, 'Antitrust Review of Mergers in Transition Economics: A Comment, with Some Lessons from Brazil', (1998) 66 *University of Cincinnati Law Review* 1113, at 1115 – 1117.

[34] Regulations of Foreign-Related Corporations in the Special Economic Zones of Guangdong Province, adopted at the 22nd Session of the Standing Committee of the 6th People's Congress of Guangdong Province on 28 Sept. 1986. See Henry R. Zheng, *China's Civil and Commercial Law* (Butterworths, Singapore 1988) 340-352.

the Company Law in 1993. At present, anti-monopoly merger review is mainly governed by the M&A Rules, which interact with and other relevant investment laws and regulations, regulations of state-owned enterprises (SOE) and state-owned assets (SOA), sectoral regulations, and the Company Law and Securities Law. Analysis of the current framework indicates that Chinese merger control may continually focus on M&A by foreign investors, although the AML may change the current discriminatory framework. The reality is a mixture of facilitating purely domestic transactions due to Beijing's ambitions to create national champions and to improve the national economy, and of scrutinising transactions involving foreign parties under the protectionist pressure. Therefore, the implications are how the current framework will converge and/or diverge with the AML in the future. It is thus worthwhile to observe such an interaction and the subsequent implications for the markets.

7.2.1 Company Law and Securities Law 2005 and the Public Takeover Measures 2006[35]

Compared to competition law, company and securities law has different objectives and primarily focuses on the protection of shareholders' interests. However, the pre-AML Chinese merger control law is mainly imbedded in foreign investment and sector-specific regulations and the latter are interacting with Chinese company and securities law.

The Company Law has a chapter to regulate corporate mergers and divisions and requests modification registration of such structural changes.[36] The Securities Law also has a chapter to regulate conduct of listed company acquisitions.[37] Promulgated according to the company and securities law, the Measures on the Takeover of Listed Companies (the Public Takeover Measures) provide detailed procedural rules and

[35] The Chinese Company Law was adopted 1993, and was amended in 1999, 2004, and 2005. The Chinese Securities Law was adopted in 1998, and was amended in 2005. Measures on Takeovers of Listed Companies (the Public Takeover Measures) were issued by the CSRC in 2002, amended in May 2006, and effective as of September 2006.

[36] Company Law 2005, ch 9.

[37] Securities Law 2005, ch 4.

stipulate that public takeovers involving industry policy, industry entry standards and SOA should obtain approval from relevant regulators prior to notify the takeover to the China Securities Regulatory Commission (CSRC). Foreign investors are further requested to comply with relevant investment regulations.[38] These rules redirect the current analysis to investment and sector-specific laws and regulations, from which one could have a glimpse on the present Chinese merger control law.

7.2.2 Anti-Monopoly Review of the M&A Rules 2006 and the Notification Guidelines

The existing Chinese merger control law was introduced in 2003, as part of the *Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign investors* (the Interim M&A Rules).[39] Further revised legislation, the *Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (the M&A Rules), was issued in August 2006 and entered into force in September 2006.[40] The M&A Rules provide a basic regulatory framework for M&A by foreign investors and have one chapter including four articles devoted to 'anti-monopoly examination'.[41]

The *Guidelines of Anti-Monopoly Notification for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (the Notification Guidelines) were issued by the Anti-Monopoly Investigation Office (the AMIO) of the MOFCOM on 8 March 2007.[42] Modelled on the EC merger control regime and promulgated for the purpose of implementing the M&A Rules' merger control system, the Notification Guidelines provide legal certainty on several procedural issues, including important clarifications on the timing and content of notification, etc.

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[38] Public Takeover Measures 2006, arts 4 and 89.

[39] The Interim M&A Rules 2003 were jointly issued by the MOFTEC, SAT, SAIC and SAFE.

[40] The M&A Rules 2006 were jointly issued by the MOFCOM, SASAC, SAT, SAIC, CSRC and SAFT. English version of the M&A Rules is available at, <http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=66925>.

[41] The M&A Rules 2006, ch 5, Articles 51-54.

[42] Official text of the Notification Guidelines (in Chinese) is available at: <http://tfs.mofcom.gov.cn/aarticle/bb/200704/20070404597464.html>.

The M&A Rules' anti-monopoly examination provisions and the Notification Guidelines represent a pilot project to establish an effective merger control law in the PRC prior to the enactment of the AML.[43] The purpose of the M&A Rules is to regulate M&A conduct by foreign investors and the merger control provisions and the Notification Guidelines are widely expected to be either replaced by or revised according to the AML in the near future.[44] However, signals from the second reading of the proposed AML may be contrary to such an expectation. The AML finally incorporates a provision stating that M&A of domestic undertakings by foreign investors should be examined according to relevant rules if the proposed transactions are related to national security.[45]

7.2.2.1 Legislative Base and Objectives

The M&A Rules are promulgated according to Chinese company law, foreign investment laws and other relevant regulations.[46] Similar to many normative documents in China, the M&A Rules aim to achieve multiple objectives, including promoting and regulating foreign investment, ensuring employment, and protecting fair competition and the country's economic security.[47] These uncertain and sometimes conflicting objectives have caused difficulties concerning interpretation and implementation. For example, should the promotion of fair competition be the sole or primary objective of the merger control system? In the absence of a primary objective, how will competing interests be balanced by the regulators? As observed by practitioners, the M&A Rules are based on the principles of necessity and pragmatism;

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[43] Compared with the Interim M&A Rules 2003, the M&A Rules 2006 have provided more certainty on the general procedures for approval and registration of transactions which do not trigger the anti-monopoly review system and have established a new mechanism of M&A through share swap. However, the M&A Rules 2006 inherited the anti-monopoly review system set up by the Interim M&A Rules 2003 without any substantive change.

[44] Peter J Wang, 'Chinese Merger Control', in Global Competition Review (GCR), *The Asia-Pacific Antitrust and Trade Review 2006* (Law Business Research, London 2006) 29, and, Jin Bosheng, *Woguo waizi binggou zhengce zhubu wanshan* (Steadily improved Chinese Policies on M&A by Foreign Investors), <http://www.fdi.gov.cn/pub/FDI/wzyj/zcfgyj/t20061013_64882.htm>.

[45] AML, art 29.

[46] M&A Rules 2006, art 1.

[47] Ibid.

and legislation related to the Chinese merger control system generally conveys a deliberate lack of clarity, with undefined or ill-defined key concepts. Because publicly available and legally binding decisions are currently lacking, ample space has therefore been left for administrative discretion.

7.2.2.2 Scope

The M&A Rules regulate transactions involving foreign parties, apply to equity and asset M&A, and cover both onshore transactions and offshore transactions.[48] As a framework for foreign investors, the M&A Rules are not applicable to transactions between Chinese undertakings or offshore transactions by Chinese undertakings. Such discriminatory treatment and its implied over-inclusive scope have attracted trenchant criticism within and outside the PRC.

7.2.2.2.1 Onshore Transactions

According to the M&A Rules, onshore transactions refer to M&A of domestic enterprises by foreign investors. The concept includes two types of transactions, namely, 'equity mergers and acquisitions' and 'asset mergers and acquisitions'.[49]

- **Equity Mergers and Acquisitions (*Guquan Binggou*)**

Equity mergers and acquisitions refer to (1) acquisition of equity interest of a purely domestic enterprise by a foreign investor and the subsequent conversion of that domestic enterprise into an FIE; or (2) a foreign investor's subscription to the increased capital of a purely domestic enterprise and the subsequent conversion of that domestic enterprise into an FIE.

- **Asset Mergers and Acquisitions (*Zichan Binggou*)**

Asset mergers and acquisitions refer to (1) a foreign investor's establishment of an FIE to acquire and operate the assets of a domestic enterprise; or (2) a foreign investor's

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[48] M&A Rules 2006, art 2.

[49] Ibid.

direct acquisition of the assets of domestic enterprise and invest those assets to establish and operate an FIE.

7.2.2.2.2 Offshore Transactions

The term of 'offshore mergers or acquisitions' (offshore transactions) has not been defined and has only been referred in the section of anti-monopoly review of the M&A Rules.[50] How the regulators assess offshore transactions remains uncertain at the time of writing.[51] However, as observed by commentators, this term could catch a large number of transactions taking place outside China.[52]

7.2.2.3 Procedural Issues

7.2.2.3.1 Enforcement Agencies: MOFCOM and SAIC

A mechanism of dual approval agencies for anti-monopoly merger review and a single approval agency for all M&A by foreign investors (based on Chinese company and foreign investment law and regardless of competition concerns) have been established since 2003. Such concurrent approval systems have caused certain confusion, in part because of the different underlying rationales and norms and the M&A Rules' legislative techniques. The institutional arrangement of the M&A Rules has been clarified as below:

- **Anti-Monopoly Review Agencies for M&A by Foreign Investors: MOFCOM and SAIC**

Under the M&A Rules, both the Ministry of Commerce (MOFCOM) and the State Administration for Industry and Commerce (SAIC) may receive M&A notifications and conduct anti-monopoly merger review.[53] No local branches of MOFCOM and

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[50] M&A Rules 2006, art 53.

[51] The official English version of the M&A Rules chose the term of 'overseas mergers.' This author chooses 'offshore transaction' for the purpose of consistency since this term was used by the Interim M&A Rules 2003 and has been frequently discussed by practitioners and scholars since 2003.

[52] *Peter J Wang* (n 42) 30.

[53] M&A Rules 2006, art 51. The MOFTEC was one of predecessors of the MOFCOM. The MOFTEC ceased to exist in March 2003 with its authorities transformed into the newly established MOFCOM. The MOFCOM also incorporated the former State Economy and Trade Commission (SETC) and partly the former State Planning Commission (SPC). Other parts of authorities of the SPC were incorporated into the NDRC.

SAIC have been allocated with merger control tasks. No further details are provided on responsibility for and allocation of cases, and given their unclear powers it cannot be assumed that both agencies will adopt a consistent approach in conducting merger reviews. As things stand, the MOFCOM has six officials and the SAIC has five to be allocated with the anti-monopoly merger review task. In practice, counsel have advised parties to submit to both agencies, but MOFCOM has been more active since 2003.[54]

- **General Review Agencies for M&A by Foreign Investors: MOFCOM and its Provincial Bureaux (with SAIC and its local Bureaux as the Registration Agency)**

Also according to the M&A Rules, the MOFCOM and its provincial bureaux are generally responsible for approving transactions covered by the M&A Rules and the SAIC and its local bureaux are the registration authority for approved transactions.[55] Which level of approval agencies, MOFCOM or its provincial bureaux, should a proposed transaction be reported to depends on the total investment, nature of the targeted enterprise or the enterprise's sector.[56] There are no notification threshold has been stipulated and it can be assumed that all transactions fall in the scope of the M&A Rules should be reported in order to obtain approval.

- **'Special Review' by the MOFCOM**

Another noteworthy point is that the M&A Rules incorporated a new article that has been described as a 'special review provision' by practitioners.[57] The article stipulates that if a foreign investor acquires 'actual control' of enterprises under certain circumstances, the proposed transaction must be notified to the MOFCOM. Non-compliance with this rule may result in termination of the transaction, divesture the

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[54] The information is based on speeches given by Michael Han and Doug Markel at Freshfields Bruckhaus Deringer Web-based Seminar 'Developments in China's Anti-Monopoly Law and M&A Regulations' on 24 January 2007.

[55] M&A Rules 2006, art 10.

[56] M&A Rules 2006, art 21.

[57] M&A Rules 2006, art 12. Doug Markel commented the article as a 'special review provision', see n 52, above.

business or any other 'effective actions' by the MOFCOM to eliminate the transaction's effects on 'national economic security'. These circumstances include (1) the acquired enterprises involving key industries, (2) the transaction may affect national economic security, and, (3) the acquired enterprise possesses famous or historical Chinese brands. The M&A Rules left the term 'actual control' and 'national economic security' undefined and it is not clear how this 'special review provision' interacts with the substantive test provided by the anti-monopoly review section of the M&A Rules.[58]

7.2.2.3.2 Notification Thresholds

- **Onshore Transaction Notification Thresholds**

The M&A Rules provide four notification thresholds for onshore transactions.[59] They are:

(a) One party in the current year has a business turnover within China exceeding 1.5 billion RMB;

(b) One party has acquired more than 10 domestic enterprises in one year in related industries;

(c) One party's market share in China has already reached 20 per cent; or

(d) One party's post-transaction market share in China will reached 25 per cent.

It's noteworthy that the M&A Rules request foreign parties' affiliates to be included when calculating theses thresholds.

The M&A Rules further introduce a 'discretionary review mechanism' which provides that even if the four notification thresholds for onshore transactions are not met, the MOFCOM and the SAIC may still request foreign parties to notify under two circumstances. They are (1) upon requested by competing domestic enterprises, relevant government departments or industry associations, if the MOFCOM and SAIC find that the proposed transaction may involve 'a very large market share' or, (2) if

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[58] See 7.2.2.4, below.

[59] M&A Rules 2006, art 51.

existing factors may 'seriously affect market competition.'[60] No further information has been provided on how these instances are to be treated by the regulators.

The discretionary review mechanism is a modification of the earlier Interim M&A Rules, which provided that if existing factors may 'seriously affect market competition, or the people's livelihood and national economic security', the MOFCOM and SAIC may require parties to notify the transaction.[61] An obviously inconsistent approach existed in the old wording due to the mixed competition and non-competition considerations. However, one cannot presume that the MOFCOM and SAIC, based on the revised article, will conduct M&A review purely dependant on competition concerns. In fact, the new wording still leaves substantial space for domestic competitors and government agencies to lobby a review of M&A by foreign investors on non-competition grounds. The case is another reminder that it might be very difficult for the current M&A regime and the future AML to be isolated from strong political influence.

- **Offshore Transaction Notification Thresholds**

For offshore transactions, The M&A Rules provide five notification thresholds including:

(a) One party possesses assets within China worth more than 3 billion RMB;

(b) One party in the current year has a business turnover within China exceeding 1.5 billion RMB;

(c) One party's market share within China has already reached 20 per cent;

(d) One party's post-transaction market share within China will reach 25 per cent; or,

(e) As a result of the transaction, one party will directly or indirectly hold equity interest in more than 15 FIE in related industries.

Similar to the thresholds for on shore transactions, foreign parties' affiliates need to be taken into account. Because each of these thresholds (China-wide assets, turnover,

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[60] The M&A Rules 2006, art 51.

[61] The Interim M&A Rules 2003, art 19.

market shares, or equity holding of more than 15 FIE in related industries) will independently trigger mandatory notification for offshore transactions, the M&A Rules have the potential to catch a large number of M&A occurring outside the PRC that involve parties with a strong presence in China. However, such transactions may not necessarily have significant competitive effects in the jurisdiction.

7.2.2.3.3 Who should Notify and Timing of Notification

Conforming to the accepted international practice, the M&A Rules and Notification Guidelines oblige the acquiring parties to notify proposed transactions to the competent authorities before any public announcement. For offshore mergers and acquisitions, an alternative rule is to notify at the same time as the transaction is notified to the competent authorities of the jurisdiction in which the transaction will occur.[62]

7.2.2.3.4 Documents Requested for Notification

As regards documents to be submitted as part of the notification process for the anti-monopoly review, the M&A Rules provide no clear instructions. Other provisions of the M&A Rules require parties to submit a series of documents, but they are for the purpose of foreign investment approval and registration.[63] As observed by practitioners, these requested documents do not include any separate competition-related information. The Notification Guidelines have improved legal certainty to a great degree but have also imposed considerable burdens on the parties and regulators alike. Under Article 3 of the Notification Guidelines, 19 substantive sections must be complied with, necessitating the collection and submission of a substantial quantity of documentary evidence. The sections cover, for example: information of the parties' names, legal addresses, business scopes and affiliates; a description of the proposed transaction, its objectives and economic rationale; definitions of relevant markets; a

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[62] See Article 4(2) of the ECMR, Article 6 and 54 of the M&A Rules 2006, and Articles 1 and 2 of the Notification Guidelines.

[63] M&A Rules 2006, arts 21 and 22. The contents of these two articles basically followed relevant articles of the Interim M&A Rules 2003. For detailed explanation on documents requested see Maher M Dabbah and Paul Lasok, *Merger Control Worldwide* (Cambridge University Press, Cambridge 2005) 270-272.

description of supply and demand structures; details of the top five competitors in all relevant markets; and the competitive conditions of the relevant markets such as entry analysis and the parties' vertical and horizontal agreements. Although most required information is clearly necessary for the AMIO to conduct its assessment, the need to submit certain documents (such as the notification party's notarized registration certificates) has been criticized as excessive, unnecessary and unrealistic. Given that many transactions that trigger mandatory notification may have a very limited nexus with the PRC, the European Commission's Short Form on merger notification and the simplified procedure on merger review could provide an alternative practical model for China to follow in the near future.[64] The Short Form and the simplified procedure are designed for the purpose of reducing the burden both on the competition authority and on parties where the notification thresholds are met, but where the parties' businesses do not overlap, or overlap in a limited way. Under such scenarios, there is no realistic possibility of competition concerns arising.

Chinese legislators already seem to be alert to these existing flaws, and the First Reading Draft of the AML adopted notification thresholds solely based on objective turnover criteria and requests much limited notification documents. Nonetheless, the current active enforcement of the M&A Rules and the Notification Guidelines serves as a useful, practical model on which to build the AML merger control framework. One must wait to see how Chinese merger control law further evolves, during the process of concluding the AML and the law's early developments.

7.2.2.3.5 Prior Notification Consultation

To improve efficiency, transparency and predictability, the Notification Guidelines introduce a prior notification consultation mechanism. Parties are encouraged to contact the AMIO officials before the formal notification and to discuss the necessity

[64] See Annex 1 'Form CO relating to the notification of a concentration pursuant to Council Regulation (EC) No. 139/2004' to the Implementing Regulation (Commission Regulation (EC) No. 802/2004) and the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004 [2005] OJ C56/32.

of notification and issues of market definition.[65] This rule also appears to follow the EC but not the US practice. In the EC, undertakings are consistently encouraged pre-notification contact with the Commission. While in the USA, the 'file and pray' is still the predominant approach.[66]

7.2.2.3.6 Time Limits for Approval and Decision-making Process

Information on the decision-making process is limited, although the Notification Guidelines specify an initial waiting period of 30 working days.[67] Should that deadline not be met, the transaction is automatically cleared. If the parties receive a notice of extension of review period, the review process will be extended to 90 working days.[68] Under the M&A Rules, if MOFCOM and SAIC determine that an onshore transaction may result in excessive concentration, impede fair competition or damage consumer interests, they will jointly or solely convene the relevant departments and enterprises, and other interested parties for a public hearing within 90 working days of receiving all requested documents. After the hearing, MOFCOM and SAIC will decide whether to approve, conditionally approve, or prohibit the proposed transaction.[69] There is no hearing procedure provided for offshore transactions however.

7.2.2.3.7 Non-compliance

Apart from the punishment for non-compliance with the 'Special Review Provision' as discussed above, the M&A Rules do not provide a mechanism for penalising non-compliance with the anti-monopoly review provisions.[70]

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[65] The Notification Guidelines, art 5.

[66] See, European Commission, DG Competition Best Practices on the conduct of EC merger control proceedings (2004), <http://ec.europa.eu/comm/competition/mergers/legislation/proceedings.pdf>, and, Cooley Godward Kronish LLP, *U.S. and Europe: A study in Contrasts*, <http://www.cooley.com/practices/content.aspx?id=US_and_Europe_A_Study_in_Contrasts>.

[67] The Notification Guidelines, art 4. (Article 52 of the M&A Rules 2006 provides a 90-day waiting period for onshore transactions but no similar time limit is provided for offshore transactions. It is not certain if this 30-day waiting period is applicable to both onshore and offshore transactions.).

[68] The Notification Guidelines, art 4.

[69] M&A Rules 2006, art 52.

[70] See 7.2.2.3.1, above.

7.2.2.3.8 Appeals

The M&A Rules do not provide a mechanism for appeal. However, Chinese administrative law provides that parties may seek administrative reconsideration and/or bring administrative litigation to the People's Court. Detailed analysis on the appeals procedure is provided in Chapter 8 below.

7.2.2.4 Substantive Tests and Exemptions from the Anti-Monopoly Review

The substantive tests of the anti-monopoly review are based on whether the proposed transaction may 'lead to over-concentration, impair fair competition or damage consumers' interests'.[71] Foreign investors are also generally required not to 'disturb the social economic order, harm the social and pubic interests, or lead to a loss of state-owned assets'. [72] Little information is available on how the regulators conduct the appraisal process.

Moreover, the M&A Rules have incorporated a noteworthy special review provision that stipulates that if a foreign investor acquires 'actual control' of domestic enterprises under certain circumstances, the proposed transaction must be reported to MOFCOM. Non-compliance with this rule may result in the termination of the transaction, divesture of the business or any other 'effective actions' by MOFCOM to eliminate the transaction's effects on national economic security. These circumstances include: (1) where the acquired enterprises involve key industries; (2) where the transaction may affect national economic security; and, (3) where the acquired enterprise is responsible for famous or historical Chinese brands.[73] The M&A Rules left the term 'actual control', 'key industries' and 'national economic security' undefined and it is unclear how this special review provision interacts with the substantive appraisal tests.

Apart from these tests, the regulators scrutinize proposed transactions according to the

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[71] M&A Rules 2006, arts 52 and 53.

[72] M&A Rules 2006, art 3.

[73] M&A Rules 2006, art 12.

Catalogue Guidance for Foreign Investment Industries (the Investment Catalogue), which covers most domestic industry sectors and classifies them into three groups, namely, industries which encourage, restrict or prohibit foreign investment.[74] The Investment Catalogue governs foreign investment in the PRC on a sector-by-sector basis and provides no competition-based provisions. However, it affects the feasibility of M&A by foreign investors and affects the M&A Rules merger control system in a remote and indirect way.

Furthermore, the M&A Rules stipulate that parties may apply for an exemption from the anti-monopoly review if the proposed transaction can: (1) improve conditions for fair competition; (2) restructure loss-making enterprises and safeguard jobs; (3) introduce advanced technologies and management talents and improve the acquired enterprise's international competitiveness; or (4) improve the environment.[75] EC and US competition law scholars may recognize the implied efficiency and failing firm defences. However, both competition and non-competition values are once again implied by the M&A Rules on appraisal tests and exemptions. As no detailed guidance has been provided on how these values are balanced, the appraisal process is subject to significant administrative discretion.

7.2.2.5 Comments

Four years after the emergence of Chinese merger control law, the relevant substantial and procedural rules have been improved to a great extent. Chinese officials have accepted a significant number of merger notifications and have conducted in-depth investigations with increasing sophistication and regulatory capacities. However, given that '[m]erger control is based on predictions of what will happen on the post-merger market',[76] and the key to an effective merger control law is to identify why and when a

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[74] M&A Rules 2006, art 4. The Industries Catalogue was issued by the former State Development and Planning Commission (SDPC), the former State Economy and Trade Commission (SETC), and the former Ministry of Foreign Trade and Economic Cooperation (MOFTEC) in March 2002, amended by the State Development and Reform Commission (SDRC) and the Ministry of Commerce (MOFCOM) in November 2004, and was effective as of January 2005.

[75] M&A Rules 2006, art 54.

[76] Brenda Sufrin, 'Competition Law in a Globalised Marketplace: Beyond Jurisdiction' in Patrick Copps and others

proposed transaction should be prohibited,[77] the M&A Rules and the Notification Guidelines continue to cause concerns due to their discriminatory approach, implied protectionism, multilayered notification thresholds and appraisal tests, and overlapping enforcement authorities. Major technical issues calling for prompt clarifications also include the current non-differentiation between horizontal and non-horizontal mergers, the uncertain degree of cross-ownership required for 'affiliates', and the lack of guidance on how to define the relevant market.

7.2.3 Special Rules on Acquisition of State-owned Assets (SOA)

In recent years, as economic reform has been strengthened in China, the pace of restructuring SOE and SOA has been accelerated. Such a process has witnessed a series of related regulations and rules. As discussed in 7.1.1 above, the Chinese government accepted M&A as an important instrument in the country's ongoing economic developments and policymakers recognize that M&A enable fragmented industries to consolidate and to develop from regional level to national and global level. In addition to generally applicable laws and regulations on M&A, a series of special rules only apply to foreign and domestic investors intending to acquire SOE and SOA. These rules often incorporate competition concerns and, to certain extent, give rise to inconsistency and uncertainty.

7.2.3.1 The SASAC System

Established in 2003, the SASAC system is the principal regulator of SOE and SOA in China.[78] The status of the SASAC system was established by *the Interim Regulation on Supervision and Administration of State-owned Assets of Enterprises* (the SASAC Regulation), issued by the State Council in May 2003. According to the SASAC Regulation, an important duty of the SASAC system is to maintain and improve the controlling power and competitiveness of the SOE and SOA in key sectors of national

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(eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing, Oxford 2003) 127.

[77] Alison Jones and Brenda Sufrin, *EC Competition Law* (2nd edn Oxford University Press, Oxford 2004) 848.

[78] The SASAC system was established according to the *Circular on the Structure of the State Council* approved at the 1st Session of the 10th NPC in March 2003.

economy and national security. The SASAC system is authorized to review and approve restructuring plans, M&A, division, and other major issues of SOE and SOA.[79] No time limits and substantive appraisal test have been clarified by the SASAC Regulation. In 2006, the SASAC issued two documents to further strength its regulatory power on restructuring activities of SOE and SOA, especially on M&A.[80] However, as typical administrative documents in China, the two documents provide no detailed provisions on procedural issues and no clarification on the relationship with other relevant laws, regulations and rules.

7.2.3.2 Rules Applicable to Foreign Investors Acquiring SOE and SOA

The M&A Rules generally require that if foreign investors plan to acquire SOE and SOA and to reorganize the target enterprises into FIE, foreign investors must comply with relevant laws and regulations.[81]

7.2.3.2.1 Filing Procedures of Listed Companies Transferring State-owned Shares to Foreign Investors 2004

A directly applicable regulation is the 2004 *Circular on Key Issues of Filing Procedures of Listed Companies Transferring State-owned Shares to Foreign Investors and Foreign Invested Enterprises* (the Circular).[82] Formulated according to the Interim M&A Rules and still effective, the Circular applies to listed non-financial enterprises transferring state-owned shares to foreign investors or FIE. The Circular stipulates that parties shall obtain approval from the SASAC and its provincial bureaux and meanwhile 'report to and ask opinions from' the MOFCOM.[83] Because of the Circular, the SASAC system exercises concurrent jurisdiction with the MOFCOM and SAIC on M&A by foreign investors, with MOFCOM and SAIC's authorities originate from the

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[79] The SASAC Regulation, arts 2, 14, 20 and 21.

[80] The *Provisional Measures on Supervision of Local SOE Administration* (April 2006) and the *Provisional Measures on Supervision of Central SOE Investment* (June 2006).

[81] M&A Rules 2006, arts 4 and 5.

[82] The Circular was jointly issued by the MOFCOM and the SASAC in January 2004.

[83] The Circular, arts 1 and 2.

M&A Rules. Such an arrangement may however result in inter-agency conflicts, a lack of accountability and uncertainty.

7.2.3.2.2 Strategic Investment of Listed Companies by Foreign Investors

Another relevant regulation on foreign investors is the 2005 *Measures for Strategic Investment of Listed Companies by Foreign Investors* (the Strategic Investment Measures).[84] 'Strategic investment by foreign investors' is defined as foreign investors acquiring listed companies (A-shares) by means of M&A as a long-and-mid-term strategic investment.[85] The Strategic Investment Measures provide that strategic investment by foreign investors shall not impede fair competition, cause over-concentration, and exclude or restrict competition in relevant domestic product market. A dual-approval system is established which requested proposed transactions to obtain approval from the MOFCOM and from the CSRC, with SAIC and its local bureaux as registration authorities. A 30-day time limit for approval is provided, which is significantly shorter than the M&A Rules.[86] As one could reasonably expect, before a foreign investor closing an M&A of a listed SOE, the proposed transaction may need to notify the MOFCOM, the SASAC, the SAIC, the CSRC for competition-related review, and to all these regulators plus the targeted SOE's sectoral regulator for foreign investment approval.

There are other administrative regulations and rules governing M&A of SOE and SOA by foreign investors with inconsistent procedure, overlapping regulators and provisions concerning competition issues without clarified substantive tests and remedies.[87] The situation has led to significant regulatory complexity which is difficult to comprehend

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[84] The Strategic Investment Measures were jointly issued by the MOFCOM, CSRC, SAT, SAIC, and SAFE in December 2005.

[85] The Strategic Investment Measure, art 2. A-shares in Chinese regulatory context refer to 'Renminbin common stocks'. The term 'certain scale' is not defined by the Measures.

[86] The Strategic Investment Measures, articles 4, 7, 8 and 12.

[87] For example, the 2002 Circular on Issues Related to Transferring State-owned Shares and Institutional Shares of Listed Companies to Foreign Investors issued by the CSRC, MOF, former SETC, the 2002 Interim Provisions on Introducing Foreign Investment to Reorganize SOE issued by the former SETC, MOF, SAIC, SAFE. The SETC was terminated with its powers incorporated in the MOFCOM in March 2003.

even for experts in the field.

7.2.4 Other Relevant Foreign Investment Law

7.2.4.1 The Law of Sino-Foreign Equity Joint Ventures 2001[88]

The Law of Sino-Foreign Equity Joint Ventures (the EJV Law) does not define 'equity joint ventures', which has caused uncertainty in interpreting the relationship between the term and the concept of 'mergers and acquisitions'. This problem is expected to be resolved by the AML which has chosen the concept 'concentrations' to cover mergers, acquisitions, and 'acquiring control' or abilities to exercise 'decisive influences' through contracts or other methods. Presumably, this will cover certain form of joint ventures.[89] The EJV Law and the *Implementing Regulations of the Law of Sino-Foreign Equity Joint Ventures* (the EJV Law Implementing Regulations) empower the MOFCOM and other agencies of provincial level authorized by the State Council to examine and approve the establishment of Chinese-Foreign EJV with a 3-month time limit.[90] No substantive appraisal test is provided but the Implementing Regulation prohibits EJV which impede the State's sovereignty, contrary to Chinese laws, disobey criteria of national economic development, cause environment pollution, or cause obvious unfair situation to jeopardize other party's interests. The EJV Law and its Implementing Regulations offer no details on how the agencies assess a proposed EJV.[91]

7.2.4.2 The Law of Sino-Foreign Cooperative Joint Ventures 2000[92]

Similar problems also exist in the Law of Sino-Foreign Cooperative Joint Ventures (the CJV Law), such as no definitions for key concepts, uncertain substantive appraisal tests and insufficient procedural information. The MOFCOM and other agencies of provincial level authorized by the State Council have been empowered to approve CJV,

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[88] The EJV Law was adopted in July 1979 and was revised in April 1990 and March 2001.

[89] See the First Reading Draft, art 16 and discussion at 7.3.1 below.

[90] The EJV Law Implementing Regulations were issued by the State Council in July 2001.

[91] The EJV Law, art 3 and the EJV Implementing Regulations, arts 4 and 6.

[92] The CJV Law was adopted in April 1988, was amended in and is effective as of October 2000.

however, with a 45-day time limit.[93] What remains to be seen is how future legislative and non-legislative measures will deal with the relationship between the concept of 'joint ventures' and of 'concentrations'. The EC competition law on 'full function joint ventures' may offer valuable experience to this question.

7.2.5 Sectoral Regulations: Examples in the Financial and Civil Aviation Sectors

Many sector-specific rules regulate M&A that incorporate competition considerations or interact with the above-discussed laws and regulations from either substantive or procedural perspective. A further question which arises is how these sectoral rules will interact with the merger control rules of the AML after 1 August 2008.

For instance, the *Commercial Bank Law*, the *Insurance Law* and the *Regulations on Administration of Financial Institutions with Foreign Investments* stipulate that M&A and foreign-invested joint ventures in the banking and insurance sectors are subject to examination and approval of the CBRC and the CIRC.[94] A very different rule appeared in the *Regulations on the Administration of Insurance Companies with Foreign Investments,* according to which mergers of insurance companies involving foreign investments should be reported to CIRC within 10 days of implementing the transaction.[95] This is the only rule that set out a non prior-notification mechanism. At the time of writing, other relevant articles on M&A in China have either prior-notification or uncertain notification mechanism.

Another interesting example is M&A rules of the civil aviation sector provided by the *Administration Provisions on Mergers and Restructures of Civil Aviation Enterprises and Airports* (the Civil Aviation Restructuring Rules).[96] Promoting fair and orderly

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[93] The CJV Law, art 5.

[94] The Commercial Bank Law was adopted in 1995 and was amended in 2003. The Insurance Law was adopted in 1995 and was amended in 2002. The Regulations on Administration of Financial Institutions with Foreign Investments were issued by the People's Banks of China (PBoC) in 2001.

[95] Issued by the CIRC in 2001. See Article 22(7) of the Regulations.

[96] Issued by the CAAC in July 2005, effective as of August 2005.

competition and preventing monopoly and 'malicious competition' are among the objectives of the rules.[97] The rules also request M&A and other restructuring activities in the civil aviation sector to comply with relevant sectoral regulations, foreign investment law and anti-monopoly law. Restructuring activities should obtain approvals from the CAAC or its local bureaux. Approval procedures and a 20 working-days time limit have been provided. There is a 10 working-day extension if a decision cannot be made within the 20 working-day time limit and upon approval of the chief official of the notified agency. This set of time limits is among the shortest in all Chinese laws and regulations on M&A. No substantive appraisal test has been clarified by the Civil Aviation Restructuring Rules.[98]

For the relationship between economy-wide competition law and sector-specific competition regimes, experience from the recent and future developments in Hong Kong SAR may be relevant to the Mainland. According to a recommendation in 2006 by the Competition Policy Review Committee (CPRC), the government of the Hong Kong SAR plans to adopt a general competition law. The existing competition rules of the telecommunications and broadcasting sectors are likely to operate alongside the proposed law. Nevertheless, the public consultation has showed that respondents prefer a unified regulatory body in the long term.[99]

7.2.6 Comments

On the whole, the current legal and regulatory framework mainly consists of subsidiary legislation promulgated by various ministries and sectoral regulators. This

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[97] The term 'malicious competition' (*E'xing Jingzheng*) has been frequently referred by Chinese officials and commentators during the past decades. The term has never been exactly defined. Based on the context the term often been employed, 'malicious competition' can be understood as an opposite of 'competition on the merits', or as 'abusive competition' compared to 'normal competition'. However, malicious competition has developed as an implicit rhetoric term and has been used, whenever it is possible, to criticize foreign take-over of Chinese enterprises.

[98] The Civil Aviation Restructuring Rules, arts 1, 2, 4, 5, 7-9, and 11-13.

[99] Connie Carnabuci and Margaret Wang, 'The Beginning of a New Era: A General Competition Law for Hong Kong', in *GCR: The Asia-Pacific Antitrust Review 2007* (Law Business Research, London 2007) 45-46.

situation has impacted adversely on Chinese M&A regulation and merger control law because the current framework's implied inter-agency conflicts that cause often contradictory substantive rules and over-decentralized enforcement authorities.

Secondly, obvious problems exist in legislative techniques. The current framework has many undefined or ill-defined terms and concepts that have caused a certain degree of confusion. Excessive discretionary or contradictory substantive appraisal tests result in non-enforceability and costly compliance. Competing agencies are claiming jurisdictions over transactions with inconsistent time limits and other procedural uncertainty. All these problems have created a bureaucratic and inefficient regulatory environment and high burdens for business.

Thirdly, conflicts among competition law and other laws and regulations are more obviously reflected by the merger control rules. Harmonization and simplification is therefore required.

Finally, the context of privatizing SOE and SOA is noteworthy with the rise of a powerful regulator, the SASAC and its local bureaux. Adjusting the current regulatory framework of SOE and SOA according to the AML, or compromise the latter according to the former, is an inevitable task for Beijing. However, a one-stop merger control regime may be politically unacceptable and thus seems too challenging to be achieved in short time.

7.3 Merger Control under the Anti-Monopoly Law 2007[100]

7.3.1 Concentrations of Undertakings (*Jingyingzhe Jizhong*)

Similar to previous drafts, the final version of the AML addresses merger control in Chapter IV, under the title 'Concentrations of Undertakings' (*Jingyingze Jizhong*). The

[100] For analysis of historical developments of the previous draft AML (the 1999, 2001 and 2004 drafts) on merger control, see *Williams* (n 14) 181-82, 194, and 207-08; and, American Bar Association (ABA), *Joint Comments on the Proposed Anti-Monopoly Law of the People's Republic of China*, at, <http://www.abanet.org/antitrust/at-comments/2005/07-05/abaprcat2005-2final.pdf>, May 2005, and, <http://www.abanet.org/antitrust/at-comments/2003/07-03/jointsubmission.pdf>, July 2003.

wording of the merger control rules of the AML, however, indicates important policy changes since the 1999 Draft.

The AML covers a variety of situations of concentrations, including, (1) mergers, (2) acquisitions of control of other undertakings through the purchase of shares or assets, and (3) acquisition of control (*qude kongzhiquan*) of other undertakings, or of the ability to exercise decisive influence (*juedingxing yingxiang*) on other undertakings, through contract or other means.[101] It's noteworthy that the AML deleted the requirement of 'adequate extent', which was incorporated prior to the First Reading Draft, for acquisitions of control of other undertakings through the purchase of shares or assets.[102]

No definitions have been provided for terms of acquisition of control and of decisive influence. Nevertheless, some clues exist which may help to understand these terms and to predict how they will be interpreted in the future. For example, as regards 'adequate extent', the April 2005 Draft provided a 20% threshold for acquisitions of voting shares. The April 2005 Draft also stipulated a concentration shall be deemed to arise when there is an acquisition of 'direct or indirect control on business operation or personnel issues', which may imply the meaning of 'decisive influence'. The reason of changes in the final wording of the AML was not clear. However, it seemed Chinese lawmakers are following more closely with the EC merger law model with plans to leave detailed interpretations to the AML enforcement agencies' future normative documents and decisional practice. In European, the ECMR defines a 'concentration' as a situation where a change of control on a lasting basis results from a merger, an acquisition, or a full-function joint venture. The ECMR further defines 'control' as having 'the possibility of exercising decisive influence' with more detailed explanations provided by two jurisdictional notices.[103]

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[101] AML, art 20.

[102] See, for example, art 16 (2) of the First Reading Draft.

[103] Commission Notice on the concept of concentration under Council Regulation (EEC) NO 4064/89 on the control of concentrations between undertakings, [1998] OJ C66/5; Commission Notice on the concept of full-function joint ventures under Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings [1998]

Other Chinese M&A laws and regulations also provide indicators. For example, the Public Takeover Measures 2006 state that an 'acquisition of control of a listed company' means any of the situations, including: (1) the investor is a majority shareholder controlling more than 50% shares of the listed company; (2) the investor can actually control more than 30% voting shares; (3) the investor has controlling powers to appoint half or more of the broad members; or (4) the investor, by virtue of the voting rights it actually controls, can exercise major influences on decisions adopted at general meetings of shareholders.[104]

A noteworthy provision may severely challenge and weaken the jurisdiction and effectiveness of the AML. Followed its predecessors, the First Reading Draft included an article which stipulates that where relevant provisions of other laws or administrative regulations regulate monopolistic conduct prohibited by the AML, the former should prevail.[105] Although this provision was finally be removed, one could still expect that the current regulatory framework of M&A may co-exist with the AML for an uncertain and considerable period of time due to the costly harmonization process and strong pressure from divergent interest groups.

7.3.2 Procedural Issues: Chinese *Guoqing* and European Style

Different to the AML rules on restrictive agreements and abuse of dominance, the AML merger control procedural rules co-exist with the merger control substantive rules under a single chapter.[106] Since the First Reading Draft, significant changes on merger control, particular those dealing with procedural issues, indicated the developments of Chinese merger control law. Although the nature of the enforcer, the structure and the notification thresholds appeared based on the ECMR model,

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OJ C66/1. A consolidated Jurisdictional Notice replace the previous four jurisdictional Notices in July 2007, see: <http://ec.europa.eu/comm/competition/mergers/legislation/draft_jn.html>.

[104] The Public Takeover Measures 2006, art 84, see n 33, above.

[105] The First Reading Draft, para 2 of art 2.

[106] Ch 4 AML.

provisions on the decision-making procedure appeared to borrow elements also from the US Hart-Scott-Rodino Act. Analysis of this section shows that the merger control rules under the AML are a creation imbedded in the Chinese *Guoqing* and designed primarily based on the European style.

7.3.2.1 Enforcement Agency: The AMEA

The Anti-Monopoly Enforcement Authority (AMEA) has been designed as an administrative control system combing investigative and prosecutorial functions with adjudicative function. To what extent the AMEA could achieve maximal accuracy at minimal administrative costs is a question to be answered. Further analysis of the AMEA is provided in Chapter 8 below.

7.3.2.2 Notification Thresholds

In comparison with the previous drafts, the First Reading Draft showed improvement by choosing turnover thresholds in place of the former multiple notification thresholds that combined criteria of turnover, transaction value, and market shares.[107] However, Since the Second Reading Draft, the merger notification thresholds have been deleted and the task of future clarification has eventually been left to the SC. The SC is in the process to promulgate AML implementing regulations in order to address a series of unsettled questions including the merger notification thresholds. The AML implementing regulations are expected to be enacted by 1 August 2008.[108] Discussion in this section has indicated the underlying force which may explain why the AML on this aspect has developed in this particular way.

Based on the ECMR model, the First Reading Draft stipulated that a prior notification should be filed with the AMEA by undertakings of the concentration if the worldwide turnover and the China-wide turnover thresholds are both met. Without the prior

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[107] It has been observed that market share thresholds are subjective and are difficult to apply in practice. See for example, ICN, Guiding Principles and Recommended Practices for Merger Notification (The ICN Recommendation), <http://www.internationalcompetitionnetwork.org/guidingprinciples.html>, and, *ABA* (n 97) Joint Comments 2005, 22-23.

[108] The Second and the Third Reading Drafts, art 20, and the AML, art 21.

notification, the concentration shall not be implemented.[109] The notification thresholds were: (1) the combined aggregate worldwide turnover of all the undertakings concerned in the preceding year exceeding RMB 12 billion (approximately EURO 1.19 billion), and, (2) the aggregate turnover of China's domestic market in the preceding year of any one undertaking concerned exceeding RMB 800 million (approximately EURO 80 million).

It had been recommended that the AML should request at least two undertakings as opposed only one having China-wide turnover meet these thresholds.[110] This comment is reasonable which aims to exclude notification from concentrations having very limited nexus with China or the effects of which are felt remote from China. Revising the notification thresholds accordingly will therefore enable the AML conform more closely to the accepted international norms of merger control law.[111] However, from the feedback within China towards the First Reading Draft in 2006, it seemed that this notification threshold problem was ignored by interested parties since no comments on this issue were provided.[112]

The First Reading Draft further provided that the aggregate turnover should include those with which the undertaking involved has controlling or affiliation relationships. In addition, the SC may stipulate alternative notification thresholds for special sectors such as banking and insurance, etc. The AMEA may adjust the thresholds for notification of concentrations according to economic development and market situations, and report such adjustments to the SC for approval. How to calculate turnover and define 'affiliation relationship', and what the thresholds for special

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[109] The First Reading draft, para 1 of art 17.

[110] *ABA* (n 97), Joint Comments 2005, 22.

[111] For example, notification thresholds of the ECMR look to combined worldwide turnover of the undertaking concerned and the Community-wide turnover of at least two of the undertakings involved in the concentration, also see *ICN* (n 103).

[112] This comment is based on two internal confidential documents issued by the SCNPC in late 2006 and early 2007 (hereinafter referred as 'the SCNPC Summary'). Sources and official titles of the documents cannot be disclosed for the purpose of informants' protection. These two documents summarized comments on the First Reading Draft by NPC and local PC members, State Council, local governments of 23 provinces, 5 autonomous regions and 4 municipalities, industries, academic institutions, non-government organisations, and professional associations.

sectors would be are all uncertain.

Nevertheless, the final version of the AML chooses not to provide specific notification thresholds, leaving the task of future clarification to the SC. The official documents and archives of the AML First Reading at the 22nd Session of the 10th NPC may explain such a choice.[113] During the discussion session on the First Reading Draft, many SCNPC members expressed their concerns regarding the turnover thresholds. For example, one member, Mr. Wen Shizhen, commented that the proposed law must take into account real situations of China and should include notification thresholds of both turnover and market share.[114] According to Wen, enterprises of certain sectors (for example transformers producers) and domestic enterprises holding key technologies normally have lower turnover which might not meet the notification thresholds stipulated by the First Reading Draft. M&A of such enterprises by MNC may however impact national economic security. He further stated that the AML should provide sector-specific turnover thresholds, and the law should prohibit M&A with post-merger market share above 1/5 or 1/4.

Another member, Mr. Ni Yuefeng, also expressed similar opinions by emphasizing the necessity to strictly prohibit 'malicious M&A' with monopolizing intentions.[115] Mr. Ni mentioned several current hotly-debated transactions in China, including Carlyle's attempt to acquire Xugong Group and Caterpillar Group to acquire Xiagong Group. He stated that MNC only acquire high-quality assets but leave all burdens and problems to the State. China will thus lose controlling powers on industry development and technology innovation by selling leading SOE without scrutiny. The comment was a very representative one. Therefore, how the merger notification thresholds will evolve

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[113] Analysis below is based on NPC, *Shijie Renda Changweihui Daibiao Weiyuan Fayan Zhaideng* (NPC: Summary on SCNPC Members' Discussion on the Proposed Anti-Monopoly Law), 27 June 2006. The summary was published by the NPC on 30 June 2006 at: <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=350218&pdmc=1520> (in Chinese).

[114] Wen Shizhen, Vice Chairman of the Financial and Economic Affairs Committee of the 10th NPC and member of the 10th SCNPC.

[115] Ni Yuefeng, Vice Chairman of the Environment Protection and Resources Preservation Committee of the 10th NPC and member of the 10th SCNPC.

under the proposed AML or by the future secondary legislative instruments remains to be seen.

7.3.2.3 Notification Thresholds for Financial and Other Special Sectors

Under the First Reading Draft, the SC was delegated with the power to set alternative notification thresholds for banking, insurance and other special sectors. This rule was in line with the EC and US practice where M&A by institutional investors are under different notification thresholds and/or exemptions.[116] Nevertheless, how widely the 'special sectors' will be interpreted is uncertain. Considering the vigorous debate on notification thresholds, the coverage of the 'special sectors' deserves a careful consideration.

Since the general merger notification thresholds established by the First Reading Draft have been deleted since the Second Reading Draft, the rule of special notification thresholds is omitted accordingly.[117] Nonetheless, future developments on the AML's merger control procedural rules are expected to have special treatment to the financial sector.

7.3.2.4 Notification Exceptions: 'Single Economic Entity'

There are two exceptions to the notification obligation, where: (1) an undertaking concerned already holds more than half of the voting rights or of the assets of all other undertakings concerned in the concentration; or (2) an undertaking not involved in the concentration holds more than half of the voting rights or assets of all other undertakings concerned in the concentration.[118]

Undertakings belonging to the same group and having the status of parent and subsidiary may have distinct legal personalities. According to the provision discussed

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[116] See Article 5 (3) (a) ECMR and Chapter on USA at *Dabbah and Lasok QC* (n 61) 1293-94.

[117] The Second Reading Draft, art 20. See 7.3.2.2, above.

[118] AML, art 23.

here, such undertakings are treated, for the purpose of the AML merger control rules, as a 'single economic entity' and therefore are exempted from notification obligation.[119]

7.3.2.5 Who Should Notify and Timing of Notification

Previous provisions on parties who should be obliged for submission of notification has been removed from the First Reading Draft, according to which, in case of mergers or joint ventures, joint notification is required; and, in case of acquisitions, the acquiring parties are required to notify.[120] As regards timing of notification, the AML provides that a notifiable concentration should not be implemented without a prior-notification. No further information on this issue is available at the time of writing.[121] Relevant provisions of the M&A Rules and the Notification Guidelines have however provided some references on parties and timing of notification.[122]

7.3.2.6 Documents Requested for Notification

Under the AML, documents requests for initial merger notification include: (1) an application; (2) information on competition in the relevant market; (3) the agreement of the proposed concentration; (4) the involving parties' audited financial reports of the preceding accounting year; and, (5) other documents requested by the AMEA.[123] According to the First Reading Draft, the 'application' requires information about the parties, worldwide turnover in the preceding year, total assets and total turnover of the preceding year within China, market share in the relevant market, and the total value of the proposed transaction and the proposed execution date of the transaction, etc.[124] The

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[119] The concept of 'single economic entity' is borrowed from the Article 81 (1) EC jurisprudence by this writer for the purpose of characterization. The concept has not yet been introduced by Chinese legislator. It's noteworthy that, 'the (EC) case law has yet to explain whether the notion of control in the ECMR should be applied to the 'single economic entity' doctrine under Article 81(1), or whether the notions of control differ as between those two provisions.' See, Richard Whish, *Competition Law* (5th edn Butterworths, London 2003) 88-89.

[120] For example, the April 2005 Draft, art 25.

[121] AML, art 21.

[122] See 7.2.2.3.3, above.

[123] AML, art 23.

[124] The First Reading Draft, art 19 and the Second Reading Draft, art 22.

First Reading Draft omitted previous requested information on costs, pricing, capacity, and the proposed transactions' effect on national economy and social public interest. This was a welcomed improvement since the previous rules were criticized for imposing unnecessarily burdensome information requirements on parties that do not raise competition concerns meriting further investigation. [125] The AML further simplifies the documentary burdens according to which, the application only need to specify issues including names, addresses, scope of business, proposed date for implementing the concentration and other matters as stipulated by the AMEA.[126]

7.3.2.7 The Preliminary Review and the Further Review

The administrative decision-making process of merger control is briefly outlined below. First, concentrations (mergers, acquisitions, and acquisition of control through other methods such as contracts) that meet the notification thresholds stipulated by the SC must be notified to the AMEA. Such concentrations cannot be implemented before notification and need to wait until the preliminary review period expired. With a preliminary review of 30 days following the notification, the AMEA may either take a decision of opening a further review investigation or a decision that no further investigation will be conducted. There is no extension to the 30-day time limit for the preliminary review. If the AMEA fails to reach a decision with the time limit, the proposed concentration is deemed to be cleared.[127]

The time limit for the further review is 90 days which can be extended by up to another 60 days under specified circumstances and with the AMEA's written notice to the undertakings involved. These circumstances include (1) the undertakings concerned agree to extend the time limit; (2) documents submitted by the undertakings concerned are inaccurate that need further verification; or, (3) relevant circumstances have significantly changed following the notification.[128]

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[125] *ABA* (n 97) Joint Comments 2005, 23.

[126] AML, art 23.

[127] AML, art 25.

[128] AML, art 26.

Furthermore, during the course of the further review, if the AMEA reaches a conclusion that the proposed concentration may eliminate or restrict competition and the undertaking concerned cannot meet certain conditions,[129] it shall adopt a decision to prohibit the concentration; otherwise the concentration shall be cleared (which may subject to conditions imposed by the AMEA).[130] There are no explicit rules on whether the AMEA will address the undertakings concerned before the final decision a statement of objections, setting out its findings and giving the undertaking opportunity to respond in writing and at an oral hearing.

The AMEA shall publish prohibition decisions or conditional approval decisions in time.[131] The transparency and accountability of the AMEA is in doubt as the draft does not require the AMEA to publish unconditional approval decisions. The unconditional approvals, however, are expected to be majorities and to be helpful guidance to future transactions. From this aspect, the proposed AML appeared to follow the US merger control model because under the ECMR, the EC Commission is required to issue decisions for unconditional and conditional clearance decisions and outright prohibition decisions.[132]

7.3.2.8 Non-compliance

Remedies for non-compliance with the AML merger control rules include orders to cease the implementation of the concentration, the disposal of shares or assets, or the transfer of business within a given time limit, and orders take all necessary measures to restore to the state of prior-concentration. A fine up to RMB 500,000 may also be imposed.[133]

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[129] Conditions which may be accepted by the AMEA include: proof of the proposed concentration will improve the conditions of competition and the pro-competition factors will obviously outweigh anti-competition factors, or the proposed concentration is in accordance with the public interests (AML, art 28). See discussion at 7.3.3, below.

[130] See 7.3.3.3, below.

[131] AML, art 30.

[132] ECMR, arts 6, 8, and 10.

[133] AML, art 48. The amount of the fine is between RMB 1 to 5 million under the First Reading Draft but since the

7.3.2.9 Appeals

The AMEA's decision is binding on the undertakings to whom it is addressed. However, for parties who disagree with the AMEA's decisions, they can apply for administrative reconsideration. If parties are not satisfied with the decisions of the reconsideration, they can refer to administrative litigation, namely, to bring an action challenging the decisions by the reviewed organs before a People's Court.[134]

Further analysis on the AML administrative appeal proceedings and judicial proceedings is provided by Chapter 8, including the dynamic interface between the AML and existing Chinese litigation rules under the 1989 Administrative Litigation Law and the 1991 Civil Procedural Law.

7.3.3 Substantive Appraisal Test

7.3.3.1 Elimination or Restriction on Competition

Previous drafts had adopted a dominance test but since 2005, the test has been changed to the 'elimination or restriction on competition'. According to the AML, a substantial appraisal test is based on whether a proposed concentration 'has or may have the effect of eliminating or restricting competition'.[135] Although it has been proposed that there should be a 'substantiality' standard before a concentration is prohibited, until now, the AML has shown no improvement in this regard.[136]

The AMEA may decide not to prohibit a proposed concentration, however, provided that the undertakings concerned can prove that the pro-competition factors of the proposed concentration clearly outweigh its anti-competitive factors, or can show that

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Second Reading Draft such an amount has been reduced, and the fine under the AML is capped at RMB 500 thousand.

[134] AML, para 2 of art 53.

[135] AML, art 28.

[136] *ABA* (n 97) Joint Comments 2005, 24.

the proposed concentration is in the public interest.[137]

7.3.3.2 National Security Review

Article 31 of the AML, which provides that mergers and acquisitions of domestic enterprises by foreign investors or other form of concentrations involving foreign investors must go through both anti-monopoly review and national security reviews 'in accordance with relevant provisions of the State', has triggered expressions of concern from US and EU business groups.[138] As regards the AML merger control rules, Western governments and MNC feared that China may use the new law to block non-domestic competitors' access to the lucrative Chinese market as well as to justify the government heavy market intervention under the name of 'national security'. Recent overseas investments by Chinese enterprises and sovereign wealth funds have caused many to believe that the AML may reflect the fact that an increasingly prosperous China no longer needs foreign investment as badly as before and that Beijing is therefore using its national security review to discourage foreign investment. Nonetheless, it is unclear how such a national security review will be applied and the wording of Article 31 AML actually indicates that Chinese policymakers intend to use other laws and regulations but not the AML to deal with concerns on national security.

7.3.3.3 Factors to be Considered: a Preliminary Framework for Analysis

Under the AML, the AMEA shall take into account the following factors, including: (1) relevant market share and market power of undertakings concerned; (2) concentration levels of relevant market; (3) effects on market entry and technology development; (4) effects on consumers and other related undertakings; (5) effects on national economic developments; and (6) other factors having effects on market competition that the AMEA considers shall be taken into consideration.[139] The proposed concentrations' effect on public interest, a factor which was required to be considered under the First

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[137] AML, art 28.

[138] Jamil Anderlini, 'Investors fear over China monopolies law' *Financial Times* (London 30 August 2007).

[139] AML, art 27.

Reading Draft, was deleted.[140]

7.3.3.4 Conditional Approval: Commitments or Remedies?

If the AMEA decides to approve a concentration, it may attach 'restrictive conditions' to the implementation of the concentration in order to 'reduce the anti-competitive conditions arising from the proposed concentration'.[141] What type of conditions, structural, behavioural, or both, will be used to modify a proposed concentration is uncertain at the time of writing. Also, whether these conditions will be applied in a manner similar to the merger commitments and remedies under the EC and US competition law has yet to be addressed by the AML's future guidelines or notices.

7.4 Horizontal Mergers in China: GOME to Acquire China Paradise as an Example

In July 2006, the consumer electronics retailers were shocked by a joint announcement between GOME Electrical Appliances Holdings Ltd. (GOME) and China Paradise Electronics Retail Ltd (China Paradise) regarding an acquisition plan. GOME, the top one consumer appliance retailer in China by turnover and profit, believed that acquiring China Paradise, the top one consumer appliance retailer in Shanghai and the top three consumer appliance retailer in China, could offer the post-acquisition group numerous benefits. Mr. Huang Guangyu, Chairman of GOME, stated that the transaction could enable the group to enjoy a strengthened position and thus to pursue further consolidation opportunities. Furthermore, the acquisition could reduce price competition and thus enable the post-acquisition group to focus on business improvements and customer services.

In fact, the two companies have had complementary geographic networks. China Paradise's leading position in Shanghai and other regions could thus benefit GOME. As of 31 March 2006, GOME and China Paradise had a combined 501 stores across

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[140] The First Reading Draft, art 23 (6).

[141] AML, art 29.

China, among which GOME had a total number of 296, China Paradise 205. In Shanghai, Zhengjiang, and Henan, where GOME had no presence, China Paradise had 52, 23, and 20 stores respectively. Commenting on the proposed transaction, Mr Huang stated that the acquisition will be an important step in GOME's development and will confirm the company's 'clear position as the market leader in China.'[142] GOME was one of the 'key and strategic enterprises' chosen by the Ministry of Commerce (MOFCOM) in 2004. The post-acquisition GOME/China Paradise was expected to have more than 800 retailing stores in the near future, with annual national wide turnover above RMB 80 billion. However, Electronics producers commented that the proposed acquisition was 'terrifying' because the 'powerful retailers' have already treated them with many unfair transactional conditions and now, the former 'Big Four' is becoming 'Big Three'.[143] In August 2006, GOME and China Paradise retailing stores in Shanghai had a large-scale price cut and had warned their suppliers not to attend joint advertising campaign, in-store promotion activities, and new store opening promotion activities with Suning, the nearest competitor of GOME and China Paradise.[144]

In October 2006, the MOFCOM held a public hearing as regards the proposed acquisition between GOME and China Paradise. Several consumer electronics producers and distributors presented the hearing and were against the acquisition. Questionnaires addressed to competitors included a question of 'what kind of influence will the acquisition bring to competitors' and other questions modeled after the EU model. However, the hearing was close-door, parties were not involved and no information was available on how the MOFCOM assessed the deal.[145] The deal was

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[142] Analysis of this paragraph is based on information from the *Joint Announcement: GOME to acquire all the issued shares of China Paradise*, on 25th July 2006 at Hong Kong Stock Market (SEHK), <http://www.hkex.com.hk/listedco/listconews/sehk/20060725/LTN20060725195.pdf>.

[143] Chen Junjun, 'Guomei tumou Yongle: kongbu de binggou' (GOME to acquire China Paradise: a terrifying takeover) *Zhongguo Jingji Shibao* (China Economic Times) (20 July 2006). 'Big Four' refers to 'Guomei', 'Suning', 'China Paradise', and post-acquisition 'Five Star/Bust Buy'.

[144] Chen Hua, 'Guomei Yongle yaoqiu gongyingshang buxu zhichi Suning' (GOME and China Paradise required suppliers not to support Suning) *Dongfang Shibao* (Orient Times) (8 August 2006).

[145] Telephone interview with counsel to one of GOME's competitors conducted in January 2007.

successfully closed in November 2006 and China Paradise became a wholly owned subsidiary of GOME.

7.5 Concluding Remarks

Regarding the AML merger control rules, many commentators believed that, although developed gradually, the major weakness is that the AMEA's powers are still too discretionary and this creates uncertainty. Furthermore, people are concerned that there are insufficient checks that could lead to excessive government interference into marketplace or to corruption or both.[146]

In conclusion, the AML may develop as a modern legislation conforming to the accepted international practice to the maximum extent consistent with China's unique requirements, a compromised product of conflicting competition policy and industry policy, or something else in between. An objective, and pro-competition merger control system is difficult to achieve in short time. A *de facto* discriminatory enforced merger control law provided by the M&A Rules may trigger trade remedies and blocking statute against China with by no means any certainty for this transitional economy. Therefore, without any reservation on the significance of a merger control law for China, this writer's pragmatic suggestion is that short and medium term implementing objectives of the AML, instead of uncontrolled *ex ante* deliberation on concentrations, could focus on minimizing entry barriers, ex post scrutiny on restrictive agreements and abuse of dominance. Market structure is always unstable in a dynamic globalising environment, and de-merger remedies can only be used as a last resort with great caution. Furthermore, it is better to address the 'national (economic) security' and 'political independence' concerns outside the realm of competition law. Having said that, China has overcome a steep learning curve to introduce a struggling but fast growing merger control law, in particular, and a system of competition law, in general.

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[146] See, for example, comments by various interested parties in 2006 SCNPC Summary, see n 108, above.

8

Enforcement

One of the most significant challenges running through the legislative debate has been the design of an appropriate AML procedure. Difficulties of resolving this problem have led to a legislative deadlock. Prior to the enactment of the AML, as the only major jurisdiction without a comprehensive competition code, China deals with competition-related issues through a series of laws, regulations, rules and policies. Currently, the State Administration of Industry and Commerce (SAIC), the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) play separate but sometimes overlapping roles on regulating competition and monopolies. The three agencies' authority originates from the AUCL, the Price Law, the Bidding Law, and most recently the M&A Rules.[147] This framework has caused inter-agency conflicts, unaccountability and uncertainty but the AML's enactment does not improve the situation. Building on the three reading drafts, the AML envisages the establishment of an Anti-Monopoly Commission (AMC) and an Anti-Monopoly Enforcement Authority (AMEA) designated by the SC. However, the law leaves insufficient certainty on commissionership, staffing and authorities of the AMC and AMEA, and on the relationship between the two institutions. Furthermore, which agency(ies) would be designated as the AMEA is still uncertain at the time of writing.

This chapter demystifies an obscure relationship between the AML procedure on the one hand, and Chinese litigation rules and legal-political reality on the other, and thus highlights how the AML affects the marketplace and governance in the PRC.

The chapter begins by tracing the historical development of the AML agency arrangement, which has been designed as an administrative control system combing

[147] See discussions on relevant laws and agencies at 3.2, 4.2, 5.2, 6.2, 7.2, above.

investigative and prosecutorial functions with adjudicative function. The chapter asks to what extent the system could achieve maximal accuracy at minimal administrative costs.

The chapter goes on to analyze the AML administrative proceedings of (1) restrictive agreements and abuse of dominance, (2) merger control, and (3) abuse of administrative powers to restrict competition. It then looks at the AML judicial proceedings of administrative and civil litigation that can be relied upon by interested parties, and explains why the AML provides these proceedings in a single article without further clarification.

Finally, by examining the 1989 Administrative Litigation Law and the 1991 Civil Procedure Law, the chapter evaluates the interface between the AML procedure and Chinese litigation rules. It answers whether a judicial check on AML agency's decisions is illusory and whether there is space for AML private enforcement. Because the AML will enter into force on 1 August 2008 and Chinese litigation rules are currently under revision, the interface is thus a dynamic and evolutionary one.

8.1 Background

The last and the most demanding task for Chinese AML legislators is the design of an optimal and appropriate enforcement system. Since such system requires the existence of relatively independent competition authority under competent check of the judiciary, it is difficult to be adopted under the current Chinese context, in which an accountable administrative and an impartial judicial system are not fully established.[148] This dilemma has led to the AML to a legislative deadlock and there has been a constant power-fighting process on institutional arrangement from 1999 to present.

The ongoing debate focuses on the superiority and feasibility of a single, centralized and (quasi-)independent enforcement authority vis-à-vis a system of multiple

[148] See ch 2, above.

enforcement agencies.[149] This chapter examines principles of the AML enforcement by looking closely at the agency arrangement, and the administrative and judicial proceedings. It also describes the status quo of the logjam between the AML and industry policy in the PRC, the latter manifests mainly as numerous and ever-growing sectoral regulations. Finally, the chapter attempts a recently raised question that asks whether the adoption of the EC competition law model would be a Trojan horse for the PRC.[150]

8.2 Institutional Structure under the Anti-Monopoly Law 2007

The 1999 and 2002 Drafts AML once envisaged an Anti-Monopoly Administration Body (AMAB) directly under the State Council[151]. The proposed AMAB was later substituted by the 2004 Draft with a 'competent commercial authority under the Ministry of Commerce (MOFCOM) which shall establish competent Anti-Monopoly Agency'.[152]

Enforcement mechanism of the April and July 2005 Drafts went back to the 1999 and 2002 model and suggested a ministry-level Anti-Monopoly Authority (AMA) and equipped the AMA with substantial investigating and decision-making powers.[153] Nevertheless, this possibility has disappeared again since November 2005. The status and competence of the AML enforcement authority is still an unclear point at the time

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[149] American Bar Association (ABA), *Joint Comments on the Proposed Anti-Monopoly Law of the People's Republic of China*, at, <http://www.abanet.org/antitrust/at-comments/2005/07-05/abaprcat2005-2final.pdf>, May 2005, 4-5 and 28-30, and, <http://www.abanet.org/antitrust/at-comments/2003/07-03/jointsubmission.pdf>, July 2003, 4 and 25-27; Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan*, 185-191, 194-197, and 440-441. For most recent comments on the AML enforcement see related papers presented at the 2nd Asian Competition Law and Policy Conference, Hong Kong, December 2006, at, <http://asiancompetitionforum.org/presentation/schedule.htm>. For example, Wang Xiaoye, 'Highlights of Chinese Antimonopoly Draft – From a Critical Perspective', in which Professor Wang emphasizes that the 'lack of a unified antitrust authority' is a serious problem of the AML.

[150] Mark Williams, 'Adoption of the EC Competition Law Model – Is It a Trojan Horse for China?', in Cheng Weidong (ed) *Zhongguo Jingzhengfa Lifa Tanyao* (An Exploration of China's Legislation on Competition) (Social Science Academic Press, Beijing 2006) 102-149, 324-357. (The article was translated into and published in Chinese. The original text was attached as part of the appendix of the book.) In this article, Williams suggests that the adoption of an EC model may create unforeseen and unintended consequences to China. See discussion in 8.6, below.

[151] See the 1999 Draft and the 2002 Draft.

[152] The 2002 Draft, arts 37 and 38, and the 2004 Draft, arts 6, 40-41.

[153] The April 2005 Draft, art 6 and the July 2005 Draft, art 5.

of writing. According to the AML, the Anti-Monopoly Commission (AMC) of the State Council shall be responsible to organize, coordinate and guide the anti-monopoly work, and the Anti-Monopoly Law Enforcement Authority (AMEA) designated by the State Council shall be in charge of anti-monopoly law enforcement.[154]

8.2.1 The Anti-Monopoly Commission (AMC): a Consultative and Coordinating Organisation

Under the First Reading Draft, the AMC is composed of heads of relevant departments of the SC and certain numbers of experts. The AMC decision-making and procedure rules will be stipulated by the SC (presumingly through future administrative regulations).[155] It is suggested that the AMC should be set up as a standing organisation and its commissioners should preferably leave their current jobs in order to make the AMC functional.[156] Nonetheless, such an arrangement has been deleted since the Second Reading Draft. Under the AML, authorities and responsibilities of the AMC include (1) formulating competition policy, (2) investigating and evaluating the overall competition condition of the domestic market and generating evaluation reports, (3) supervising and coordinating the AML enforcement (by the AMEA) and other relevant enforcement work by relevant organs and regulators, (4) harmonizing decision-makings of major anti-monopoly cases, and, (5) other responsibilities stipulated by the SC.[157]

However, the design of an AMC has been welcomed neither by scholars nor concerned parties. It is believed that the AMC will be an unnecessary, ambiguous, troublesome and overlapping organ co-existing with the AMEA.[158] In brief, the AMC is a consultative and coordinate organisation and its design reflects political difficulties and

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[154] AML, arts 9 and 10.

[155] The First Reading Draft, art 32.

[156] The 2006 SCNPC Summary, see n 15, below.

[157] AML, art 9.

[158] See, for example, Wang Changbin, 'Redefine the Function of New Chinese Competition Authorities: A View beyond Law Enforcement', Paper presented at the 2nd Asian Competition Law and Policy Conference, 2; the 2006 SCNPC Summary, comments given by the Province of Jilin, see n 15, below.

compromise in setting up the AML enforcement mechanism.

8.2.2 The Anti-Monopoly Enforcement Authority (AMEA)

8.2.2.1 The AMEA at the Central Level

As regards the AML enforcement authority, a particular vexed question is how responsibilities will be allocated between several agencies that the AMEA might incorporate in.[159]

A recent popular view is that the Ministry of Commerce (MOFCOM), the State Administration for Industry & Commerce (SAIC) and the National Development and Reform Commission (NDRC), will assume the role of AMEA and will have concurrent jurisdiction to enforce the AML. The first reason of such an observation is that the MOFCOM holds powers to enforce the 2003 M&A Rules (now the revised 2006 M&A Rules) and would be responsible for merger control; the NDRC has supervised the 1997 Price Law and the 2003 Interim Price Monopoly Rules, and would scrutinize anticompetitive agreements especially cartels; and the SAIC has enforced the 1993 AUCL, and thus would investigate abuse of dominance and certain merger review (under the M&A Rules).[160] The second reason is that according to wordings of the AML, it seemed one or more affiliated agency(ies) will be appointed by the SC by 1 August 2008.

This writer argues that whilst such understanding is however incomplete and might even contrary to the will of Chinese legislators. In fact, which agency (ies) will be appointed as the AMEA and hierarchy of the AMEA are still uncertain at present. This argument is in part based on an official NPC document summarizing nationwide feedbacks on the First Reading Draft from interested parties (hereinafter referred to as the '2006 SCNPC Summary').[161]

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[159] Similar concerns have been expressed by scholars and practitioners recently. For example, *Wang Changbin* (n 12) 1; Michael Han, 'Development in China's Anti-Monopoly Law and M&A Regulations', speech at Freshfields Bruckhaus Deringer Web-based Antitrust Seminar on 24 Jan 2007.

[160] See for example, Wang Changbin (n 12) 1 and 5.

[161] An internal confidential document issued by the Legislative Affairs Office of the SCNPC (the Standing

According to the 2006 SCNPC Summary, a typical view among Chinese agencies currently regulating competition-related issues came from the SERC (State Electricity Regulatory Commission). The SERC suggested that the wording of 'Anti-Monopoly Enforcement Authority designated by the State Council' should be clarified as ministries and other agencies of the SC which function as market regulators according to laws and administrative regulations. Since among 78 agencies of the SC by early 2007, at least 29 agencies more or less have certain powers on regulating competition and market, this suggestion implied an over-broad enforcement framework. Nevertheless, this suggestion reflects the ongoing power-fighting on the AML enforcement among Chinese agencies at the highest level.[162]

On the contrary, local governments, academic institutions, professional associations and industries criticized the uncertainty and non-independency on the AML institutional arrangement.[163] For example, Tibet and provinces of Helongjiang and Guangdong questioned the AMEA and suggested that which agency would be appointed must be clarified. Jiangsu, one of the most developed provinces of the PRC, suggested that the absence of an independent and competent enforcement agency indicates that the time is not yet ripe for enacting the AML. This view was also shared by scholars of China Academy of Social Science (CASS), the highest Chinese official research institution in social science.

Over the years, the anonymous Chinese attending public discussions has also provided

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Committee of the National People's Congress) in December 2006. Source and official title of the document cannot be disclosed for the purpose of informants' protection. This document summarized comments on the June 2006 Draft AML from NPC and local PC members, State Council, local governments of 23 provinces, 5 autonomous regions and 4 municipalities, industries, academic institutions, non-government organisations, and professional associations.

[162] See discussions in chs 2 and 3 on power-fighting of AML drafting and enforcer status among Chinese central government agencies. The seventy eight SC agencies include 28 ministries and commissions (MOFCOM, SDRC, etc.), 1 special organisation (SASAC), 18 organisations (SAIC, STA, GACA, etc.), 6 offices (TAO, HMAO, etc.), 14 institutions (CIRC, CSRC, SERC, etc.), and 14 bureaus (STMA, SPB, SAFE, etc.). See discussions at 2.3.1, above. Structural framework and information of SC is available at <http://english.gov.cn/links/statecouncil.htm>.

[163] Critical opinions came from governments of Shanghai, Tianjin, Chongqing, Jiangsu, Zhejiang, Hunan, Guangxi; China Academy of Social Science, China Academy of Engineering, Development Research Centre of the SC; Foreign Investment Enterprises Association, Sino-Pec, China Life Insurance Co.; Tsinghua Univ. China Univ. of Politics and Law, Xiamen Univ. etc.

their enthusiasm and wisdom towards the anti-monopoly enforcement. [164] One comment by a questionnaire respondent reads 'it will be much quicker to establish a Monopoly-Protection Authority than be struggling to set up an Anti-Monopoly Enforcement Authority. All we need is each ministry, commission, and bureau provides one official.'[165]

'The AML legislation has been the most democratic lawmaking process in the history of the PRC', so said Professor Xiaoye Wang, a top Chinese competition law scholar.[166] Signals from the 2006 SCNPC Summary and the ongoing public discussions are that the demand and desire for a relatively independent or at least centralized AML enforcement agency parallel the power-fighting process. Over the years, such a demand and desire is becoming more powerful and persuasive, although it is unrealistic to predict whether it would win by 1 August 2008. It may be even stronger in the long run and thus may predict the future trend of the AML. While transitional China is ushering in a more plural society slowly but inevitably, the evolution of AML and its enforcement mechanism continue to prove a proposition that competition law and policy change as interest group demands change.[167]

8.2.2.2 The AMEA Local Branches

Another major concern is the necessity of establishing AMEA local branches across the PRC taking into account the size of the country and the possible heavy workload to a one-stop AML enforcement mechanism. However, if the answer is yes, the following question is how the system should be designed in order to minimum enforcement inconsistency between central and local enforcers and to avoid regulation capture by local business.

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[164] At the time of writing, most major national presses and websites have had on-off or continued open discussions on the AML legislation.

[165] Source: questionnaire respondents to the current writer's field research in China in summer 2005. See Appendix 2 for data explanation.

[166] See 3.1.5, above.

[167] M L Greenhurt & Bruce Benson, *American Antitrust Laws in Theory and in Practice* (Avebury, Aldershot 1989) 179-80.

To assure nationwide consistency, the previous drafts AML did envisage a network of local branches at the provincial level which would be under the unified leadership and administration of the AML authority under the SC.[168] However, the AML finally provides that the AMEA can authorize 'the corresponding organs of the people's government at provincial level' to be in charge of the AML enforcement responsibilities.[169] Considering the widespread problem of regional blockade in the PRC, this design of decentralized enforcement branches implies a danger of local influences and conflict of interests that may compromise the consistency and transparency of the AML to an immeasurable content.[170]

8.2.3 The People's Court System

The people's court system is a four-level, complex but still vulnerable one in the hierarchy of the PRC power system.[171] The AML empowers the people's courts to review the legality of acts of the AMEA and to adjudicate anti-monopoly compensation claims brought by injured parties. Analyses of AML judicial proceedings of administrative and civil litigation are provided at 8.4 below. However, at present, it would be unrealistic to predict the degree of judicial function of the people's court system on the AML.

8.3 The Anti-Monopoly Administrative Proceedings

The AML provides three packages of different administrative proceedings, with relevant rules of which spread in Chapters I, IV, VI, and VII. These three packages are proceedings: (1) on restrictive agreements and abuse of dominant market positions; (2) on merger control; and, (3) on abuse of administrative powers to eliminate or restrict

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[168] For example, art 37 of the April 2005 Draft and art 33 of the July 2005 Draft AML.

[169] AML, para 2 of art 10.

[170] See discussions on local protectionism /regional blockades in 4.5.2, above. Also see ABA (n 3), comments on art 37 of the April 2005 Draft, at, *Joint Comments 2005*, 29.

[171] See 2.4, above. The four levels are: (1) the Supreme People's Court at the national level, (2) the Higher People's Courts at the provincial level, (3) the Intermediate People's Courts at the municipal level, (4) the Basic People's Courts at county or district level.

competition. The first two packages cover infringements defined as 'monopolistic conduct', the principal subject matter of the AML. The third package covers enforcement rules on a type of conduct, widely known and referred as 'administrative monopoly', which is not defined as 'monopolistic conduct' but is declared unlawful by the AML. The current AML framework empowers the AMEA jurisdiction on monopolistic conduct and delegates other competent administrative organs jurisdiction on abuse of administrative powers to restrict competition.

This section starts analyses from power of the AMEA on the three packages of AML administrative proceedings. It further examines administrative review, a mechanism provided by existing Chinese law, which functions as internal checks within the administrative system of the PRC.

8.3.1 Power of the AMEA: The Integration of Investigation, Prosecution and Adjudication

The AML enforcement mechanism has been based on an EC model of competition procedure since 1999. As analyzed already, the PRC made such a choice for a variety of reasons.[172] The principle features of such mechanism are administrative control and the combination of investigative and prosecutorial function with adjudicative function to a specialized administrative agency.

The concept of 'administrative control system of competition law' means a mechanism in which: (1) administrative decision making is central, but subject to judicial checks by courts; (2) basic objectives often intertwine with or aim to implement governmental policies; (3) government administrators and specialized procedures play the central roles; (4) implementation, more or less discretionary, relies on a variety of compliance tools, including competition advocacy and informal guidance to undertakings, etc.[173]

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[172] See chs 5, 6, and 7, above.

[173] See David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1st paperback edn Oxford University Press, Oxford 2001) 128 and 173. The contents of this paragraph are also based on Gerber's presentation at a book launch seminar (held for the Chinese edition of *Law and Competition in Twentieth Century Europe*) in Beijing on 31 October 2004.

Under the AML, similar to the European Commission, the AMEA combines the investigative and prosecutorial function with the adjudicative function. According to the Chapter VI Investigation of Suspected Monopolistic Conduct and Chapter IV Concentrations of Undertakings, the AMEA has some substantive but roughly-outlined powers to investigate and assess possible monopolistic conduct. These powers include investigating and evaluating sector-specific market competition conditions, inspection of business premises, interviews, request and collection for information and evidence, inquiring and freezing bank accounts, interim measures, accepting commitments and reopen proceedings, finding infringements, imposing fines and adopting decisions, etc.

Wils, an EC competition law commentator suggests that, for comparing different competition enforcement system, accuracy and administrative costs can be two premier factors. Wils claims that these two factors can be relied on when choosing between function-separate and function-integrated options of competition enforcement mechanisms. He recognizes that a wide range of factors may have influence on capacity of an enforcement system, for example, 'the level of expertise' and 'the availability of sufficient resources'. However, he further observes that these factors should be assumed with equal footing in any given competition law enforcement system, and focus should be given to whether the system 'achieves maximal accuracy at minimal administrative cost'. The reason is that accuracy and administrative cost can be significantly different, for example, in the function-separate US antitrust enforcement system and the function-integrated EC system. [174]

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The question 'whether the AML enforcement mechanism could achieve maximum accuracy at minimum administrative cost' is highly relevant that is worthy to be assessed by commentators and is necessary to keep vigilant by Chinese policymaker and enforcer.

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[174] Wils, *Principles of EC Antitrust Enforcement*, (Hart Publishing, Oxford 2005) 161-62.

8.3.2 Rules on Restrictive Agreements and Abuse of Dominance

Enforcement rules on the prohibition of restrictive agreements and abuse of dominant market position are provides by the AML in Chapter VI Investigation of Suspected Monopolistic Conduct and Chapter VII Legal Liabilities.[175]

The AML administrative proceeding on restrictive agreements and abusive behaviour by dominant undertakings is outlined below. Firstly, an AML investigation can be opened under the AMEA's initiatives or after receiving complaints. The undertaking involved has rights to state its case and to defend itself. Secondly, if the undertaking concerned offer commitments to eliminate effects of the alleged monopolistic conducts within certain time limit, the AMEA may suspend the investigation. How long will the time limit extend has not yet been provided by the AML. The AMEA shall supervise the performance of the commitments. It may decide to terminate the investigation (without given a formal decision) and may decide to reduce or relieve the penalties upon satisfied performance of the commitments. However, the AMEA may reopen the proceeding when some conditions are satisfied. These conditions are (1) failure to perform the commitments by the undertakings involved; (2) substantial changes occurred to the facts upon which the decision of suspending the investigation was made; or (3) such decision was made upon incomplete or misrepresented information by the undertakings involved.

After investigation and verifying evidence, if the AMEA determines that the alleged behaviour constitutes monopolistic conducts stipulated by the AML, it can adopt a decision finding an infringement of the AML, ordering the undertaking concerned to terminate the behaviour, and/or imposing fines (between 1-10% of previous annual turnover) and confiscating the illegal gains. As regards non-implemented restrictive agreements, a fine less than RMB 500 thousands may be imposed. Furthermore, for parties of restrictive agreements reporting relevant information and provide important evidence, the AMEA may adopt a decision of reduced or exempted punishment. This

[175] This framework has been followed since the 1999 Draft. See relevant articles of AML, including chs VI & VII, AML, esp. arts 38-47, 49-50, and 52.

rule can be seen as a rudimentary form of a Chinese leniency mechanism towards cartels.[176] When deciding amounts of fines, the AMEA shall take into account factors such as nature, extent and duration of the alleged behaviour. The AMEA may publish its decisions to the public.

8.3.3 Rules on Merger Control

Different with the enforcement rules on prohibiting restrictive agreements and abuse of dominance, enforcement rules concerning merger control are mainly provided in the Chapter IV Concentrations of Undertakings and therefore co-exist with the substantive rules on merger review. This arrangement is also based on the ECMR model. Only one article regarding merger control is provided in the Chapter VII Legal Liabilities which stipulates that implementing an unauthorized concentration may incur a fine up to RMB 500 thousands and other measure in order to restore to the conditions of pre-concentration.[177]

The administrative proceeding of merger control is briefly outlined below. First of all, concentrations (mergers, acquisitions, and acquisition of control through other means such as contracts) that meet the notification thresholds stipulated by the AML must be notified to the AMEA. Such concentrations cannot be implemented either before notifications or until clearances by the AMEA. With a preliminary review of 30 days following the notification, the AMEA must make a decision that if a further review will be opened. There is no extension to the 30-day time limit for the preliminary review. If the AMEA fails to reach a decision with the 30-day time limit, the proposed concentration is deemed to be cleared. Secondly, the time limit for the further review is 90 days which can be extended by up to another 60 days under specified circumstances and with the AMEA's written notice to the undertakings involved. These circumstances include (1) the undertakings concerned agree to extend the time limit; (2) documents submitted by the undertakings concerned are inaccurate that need further verification;

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[176] See 5.3.1.2 and 5.3.3.2, above.

[177] AML, arts 23-26, 30, 48.

or, (3) relevant circumstances have significantly changed following the notification. Furthermore, during the course of the further review, if the AMEA reaches a conclusion that the proposed concentration may eliminate or restrict competition and the undertaking concerned cannot meet certain conditions,[178] it shall adopt a decision to prohibit the concentration; otherwise the concentration shall be cleared (which may subject to conditions imposed by the AMEA). There are no explicit rules on whether the AMEA will address to the undertakings involved before the final decision a statement of objections, setting out its findings and giving the undertaking opportunity to respond in writing and at an oral hearing.

Many commentators and critics of the current enforcement rules believed that, although developed step by step, central weakness of the AML merger control rules is still too many uncertainties and too much discretionary authority to the AMEA. They feared that there are insufficient checks which could lead to excessive government interference into marketplace or to corruption of the officials or both.[179]

8.3.4 Rules on Abuse of Administrative Power to Eliminate or Restrict Competition

As regards administrative monopoly, the AML provides that conduct of administrative and/or public organizations which abuse administrative powers to restrict competition shall be ordered to revoke andmodify such conduct by relevant governmental agencies at higher level. The AML further provides that where other laws and administrative regulations stipulating abuse of administrative powers to eliminate or restrict competition, those provisions shall apply.[180]

Previously, it was the AML authority which shall order the alleged agencies to revoke

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[178] See 7.3.3, above. Conditions which may be accepted by the AMEA include: proof of the proposed concentration's pro-competition factors will obviously outweigh anti-competition factors, or the proposed concentration is in accordance with the public interests. See AML, art 28.

[179] Huang Yong, Wang Xiaoye, see n 3, above, and comments by various interested parties in the 2006 SCNPC Summary, see n 15, above.

[180] AML, art 51.

the administrative abusive behaviour. Currently deleted enforcement rules also include powers of the AMEA to refer the alleged abusive administrative behaviour to criminal procedure when the behaviour may constitute a criminal offence. And the AMEA's power to request the alleged agencies rectifying or revoking promulgated rules that eliminate or restrict competition.[181] Therefore, one may reasonably predicate a major dilemma implied by the current rules that although the AML still attempts to regulate abuse of administrative power to restrict competition, this type of behaviour however falls outside the jurisdiction of the AMEA but falls within the jurisdiction of 'other competent administrative organs', a category which include uncertain numbers of agencies in the PRC.[182]

8.3.5 Administrative Reconsideration (*Xingzheng Fuyi*): The Internal Check Mechanism[183]

Administrative reconsideration, according to the Administrative Reconsideration Law (ARL), the Administrative Litigation Law (ALL), and relevant judicial interpretations, refers to citizens, legal persons, and other organisations applying to administrative organs for reconsidering the legality and/or appropriateness of specific administrative actions.[184] Administrative reconsideration is therefore an internal administrative remedy available to grieved parties of administrative decisions and behaviour.

Analysis of AML administrative reconsideration has been ignored by commentators. Until present, not much relevant literature has provided insights on this topic. While Huang, a Chinese scholar recently examined the insufficient design of the AML remedies, argued the AML would be 'a toothless monster', and briefly asked who would be parties to the AML administrative reconsideration, but he suggested no answers.[185]

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[181] For example, the April 2005 Draft, art 49.

[182] *Wang Xiaoye* (n 3) 11.

[183] 'Xingzheng fuyi' sometimes is translated as 'administrative review'.

[184] ARL, arts 1 and 2.

[185] Huang Yong, 'Zhongguo Fanlongduanfa xia de Jiuji Cuoshi' (Remedies of Chinese Anti-Monopoly Law), Paper

However, taking into account the status quo of a strong administrative system versus a relevantly weak judiciary in the PRC, the AML administrative reconsideration proceeding is important and may play a significant role in the AML's future enforcement after 1 August 2008. Furthermore, existing framework of Chinese law has indeed provided basic, although not optimal answers, both to the AML administrative reconsideration and to the AML administrative litigation. A step by step inquiry is therefore offered below which explores key concepts and major aspects of the AML administrative internal check mechanism through a dialogue between the 1999 Administrative Reconsideration Law (ARL), the 1989 Administrative Litigation Law (ALL), and the AML.

8.3.5.1 The Context: The Administrative Reconsideration Law 1999 (ARL) and the Administrative Litigation Law 1989 (ALL)

The AMEA's decision is binding on the undertakings to whom it is addressed. AML interested parties can refer to administrative reconsideration as the first venue to challenge the AMEA's decisions on concentrations between undertakings. If the parties are not satisfied with the decisions of the reconsideration, they can refer to administrative litigation, namely, to bring an action challenge the decision by the reviewed organs before a People's Court.[186] For the AMEA decisions on restrictive agreements and abuse of market dominant position, parties can choose to apply for administrative reconsideration or directly bring an action to challenge the decision.[187]

Administrative litigation is analyzed in the next section of judicial proceedings. However, two existing and closely linked Chinese laws, the ARL and the ALL need to be introduced here since they provide key concepts and a context for any further

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delivered at the 2nd Asian Competition Law & Policy Conference, 1 and 7, see n 3, above.

[186] AML, art 53. See, also, art 25 of the 1989 Administrative Litigation law, which reads: When citizens, legal persons or other organisations directly bring actions before the People's Court, administrative organs which took the specific administrative actions are the defendants. For reviewed specific administrative actions, if reviewing organs withhold the specific administrative actions, the original administrative organs are the defendants; otherwise the reviewing organs are the defendants.

[187] AML, art 53.

investigations on the AML administrative and judicial proceedings. Furthermore, the AML does not provide any explanations on administrative reconsideration and administrative litigation, which implies that reference to the ARL and the ALL is imperative in order to fully understand the relevant AML enforcement rules. Therefore, a preliminary analysis of administrative reconsideration and administrative litigation in China and their implications to the AML is provided here and in the following section.

Nevertheless, the interaction between the ARL, the ALL and the AML enforcement has inevitably ushered in a broader legal landscape in which Chinese constitutional law, administrative law, criminal and civil laws and relevant litigation rules need to be taken into account. Therefore, more detailed investigation will not be conducted in this thesis; the topic however merits another timely and more in-depth academic endeavour.

8.3.5.2 Key Concepts: Specific Administrative Actions (*Juti Xingzheng Xingwei*) and Abstract Administrative Actions (*Chouxiang Xingzheng Xingwei*)

Currently, 'specific administrative actions' are the principle subject of both administrative reconsideration and administrative litigation in the PRC. Thus, this term and its opposite, namely, 'abstract administrative actions', need to be clarified first.

Specific administrative actions, according to the ARL, the ALL and relevant People's Supreme Court judicial interpretations, refers to unilateral actions undertaken by administrative organs and/or their personnel, organisations exercising administrative functions, or other organisations or individuals entrusted with administrative powers by administrative organs, which target specific citizens, legal persons or other organisations and produce legal effects such as to affect their interests, rights and obligations. In the AML context, interim measures taken and/or decisions imposed by the AMEA and its local branches are 'specific administrative actions' and thus may be subject to administrative reconsideration and litigation.

On the contrary, according to Article 12 of the ALL, abstract administrative actions refer to administrative regulations, ministerial rules, decisions and orders, and other

normative documents with general binding force adopted by administrative organs. Although under trenchant criticism and possible reform has been demanded over the years, at present, abstract administrative actions are basically administratively and judicially non-reviewable.[188] The AML prohibits administrative organs and public organization abusing administrative power to set rules with contents that eliminate or restrict competition. However, these rules will be categorized as 'abstractive administrative actions' and therefore is out of control by administrative reconsideration and litigation.[189]

8.3.5.3 The Anti-Monopoly Administrative Reconsideration Authority(ies)

Currently, the legal basis for identifying AML administrative reconsideration authority(ies) is Article 14 of the ARL. This article provides that interested parties can apply for administrative reconsideration to organs of the State Council against specific administrative actions adopted by the same organs. Article 14 also allows interested parties apply for administrative review directly to the State Council against specific administrative actions adopted by organs of the State Council. However, according to the ARL, decisions by the State Council's administrative review will be final and interested parties will lose their rights of referring to administrative litigation. Therefore, direct applications to the State Council for administrative review rarely happen in practice.

In sum, under the ARL and the current AML framework, the administrative reconsideration authority(ies) against decisions adopted by the AMEA should be either the AMEA or the State Council.

As regards decisions adopted by the AMEA local branches, which are currently specified as 'the corresponding organs of the people's government at provincial level', interested parties shall have rights to choose either apply to the AMEA or to the

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[188] ARL, art 7.

[189] AML, art 37.

people's government at provincial level for AML administrative reconsideration. The legal basis of is Article 15 of the ARL.

8.3.5.4 A Proposal

Considering the complex nature of competition cases which require detailed fact-finding and rigorous legal, economic, and empirical analysis, also considering the fact of local blockade and protectionism in the PRC, it is hereby submitted that future AML revision and/or (non-)legislation may specifically establish a special panel under the AMEA and delegate the panel status of the AML administrative reconsideration authority. On this aspect, the recent EC Commission experience on Chief Economist and the Peer Review Panel, which reflects an emphasis on procedural informal safeguards, may have particular relevance to Mainland China. Considering the scope of this thesis, this point will not be further discussed here.

8.3.5.5 Limitation Periods for Anti-Monopoly Administrative Reconsideration

Article 9 of the ARL laid down a 60-working-day general limitation period (unless extended by other laws) for all applications for administrative reconsideration. Limitation periods for adopting decisions of administrative reconsideration are provided by Article 31, which includes a 60-working-day general period (unless deduced by other laws). This limitation period can be extended by up to another 30-working-day when decisions cannot be made in 60-working-day because of complexity of the cases concerned and when approvals are granted from head of the administrative reconsideration authority. In brief, unless the AML further specifies limitation periods of the AML administrative reconsideration, the ARL rules shall apply.

8.4 The Anti-Monopoly Judicial Proceedings

Administrative litigation has been provided by the AML as a statutory remedy for parties who challenge decisions by the AMEA or its local branches in front of the People's Court system. Civil litigation is available for injured parties to seek compensation. Since the current literature has provided insufficient analyses on the

implications of administrative and civil litigation to the AML, this section aims to identify uncertainties and to submit possible answers.

8.4.1 Administrative Litigation

8.4.1.1 Is Administrative Reconsideration a Prerequisite for Administrative Litigation?

A hotly-debated issue of the 2006 SCNPC Summary focuses on whether the AML administrative reconsideration is a prerequisite procedure prior to challenging the AMEA's decisions before a court. Furthermore, it has been suggested that interested parties should be provided with rights of choice on either (a) administrative reconsideration followed by administrative litigation, or (b) direct administrative litigation without administrative reconsideration.[190] The AML finally chooses both approaches although according to the authentic wording prior to the First Reading Draft, it seems that an administrative reconsideration does be required before the opening of a judicial procedure.

8.4.1.2 The AML Administrative Litigation Plaintiff(s) and Defendant(s)

The first question to be answer is who can sue whom. According to relevant articles of the ALL and the AML, as a general rule, all decisions imposed by the AMEA and its local branches (AML decisions) producing legal effects to interested parties may be subject to judicial check through administrative litigation to a people's court. It is therefore a straightforward answer that parties who are addressed by AML decisions are plaintiffs of AML administrative litigation.

However, who would be the defendant(s) is worth a two-step analysis. First of all, if the AML allows interested parties to challenge the AML decisions before a court without first seeking administrative reconsideration, and if the decisions were imposed by the AMEA, the AMEA will be the defendant. On the contrary, if the decisions were

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[190] According to the 2006 SCNPC Summary, see n 15, above, the Supreme People's Court of PRC and provinces of Shandong and Jilin suggested that the AML should clarify whether administrative review is a prerequisite of administrative litigation. Policy Research Office of the SC, National Development Bank, China People's University, etc. suggested that AML parties should have rights to choose proper venues to challenge the AMEA's decisions.

imposed by the AMEA local branches, whether the local branches will be the eligible defendants calls for further legislative and/or judicial interpretations. The reason is that according to Article 25 of the ALL, if administrative decisions are imposed by delegated organisations, the authorizing administrative organs are the defendants. Under the current AML context, the AMEA local branches are 'corresponding organs of the people's government at provincial level' authorized by the AMEA. Therefore, the AMEA should be the defendant of an AML administrative litigation, no matter the challenged AML decisions are imposed by central or local AML authority(ies).[191]

Secondly, if the AML requires AML administrative reconsideration as a prerequisite for AML administrative litigation, or if the concerned parties do choose firstly refer to administrative reconsideration but then not satisfied by the outcome, according to Article 25 of the ALL, who will be the defendants will depend on whether the AML administrative reconsideration authority(ies) change the original AMEA decisions. That means if the AML administrative reconsideration authority supports the original AMEA decision, the AMEA will be the defendant. Otherwise, if the original AMEA decision is changed by the AML administrative reconsideration authority, the reconsideration authority will be the defendant. In this case and under the current AML framework, AMEA, the State Council, and the people's government at provincial level are all possible defendants of AML administrative litigation.

Judging by these analyses, obvious tensions exist on legal certainty, litigation costs, administrative burdens, accuracy and connecting factors behind the status quo as regards identifying defendants in AML administrative litigation. One may thus reasonably conclude that these problems do need to be addressed by legislators, the Supreme Court (by way of judicial interpretation), and scholars in the near future.

8.4.1.3 Legal basis for the AML Administrative Litigation

Article 53 of the AML allows dissatisfied parties referring to administrative litigation

[191] AML, art 10.

to challenge AMEA decision. However the AML does not provide specific legal basis on which the interested parties can rely on. Once again the question has to be answered by looking at the ALL.

According to Article 11 of the ALL, eight types of specific administrative actions are judicially reviewable through administrative litigation. Among them the first three categories are relevant to the AML enforcement, they are: (1) administrative sanctions, including detention, fines, revocation of business licenses or permits, orders to suspend production or business, confiscation of property, etc; (2) coercive administrative measures, including restrictions of personal freedom, seizing or freezing property and/or bank accounts, etc; (3) interfering with business' autonomous rights.

Furthermore, Article 54 of the ALL specifically provides that seven types of inappropriate conduct by administrative organs may cause a specific administrative actions being revoked, partially revoked, or modified by the people's courts. The courts may also order the defendant administrative organs (the defendants) to perform a new specific administrative action or perform its legal responsibilities. These seven categories are all relevant to the AML enforcement, including:[192] (1) The alleged specific administrative actions are based on insufficient principal evidence; (2) The alleged specific administrative actions are imposed through an incorrect application of laws or rules; (3) The defendant administrative organs violated legally prescribed procedures; (4) The defendant exceeded its legal authority; (5) The defendant abused its power; (6) The disputed administrative penalties are clearly unjust; (7) The defendant's failure to act or delayed to act of its legal responsibilities within reasonable time.

Under the AML context, a plaintiff can therefore rely on administrative litigation against an AML decision before a people's court on both factual and legal grounds. The court may annul, partially revoke, or change the coercive measures, the fine and/or

[192] The wording below is based on art 54 of the ALL and Minxin Pei, 'Citizens v Mandarins: Administrative Litigation in China' (1997) 152 *The China Quarterly* 855-56.

other penalty imposed by the AMEA or its local branches.

8.4.1.4 Jurisdiction

The next logical question is which court(s) will have jurisdiction on cases brought against the AMEA and its local agencies. Although this question can only be fully answered after identifying defendants of the AML administrative litigation, a preliminary answer based on all available legal information is provided as below.

According to Articles 15 and 17 of the ALL, the courts of first instance for AML administrative litigation can be the intermediate people's courts of Beijing and other intermediate people's courts at municipal level. The appellate courts can be the higher people's courts of Beijing and other higher people's courts at provincial level. Although the court of first instance can also be one of the higher people's courts if the case is 'important and complex', it is however hardly happen in practice according to official statistical terms.[193] Currently, civil and administrative litigation in the PRC is subject to one appeal only.

Under the AML context, considering the fact of total 389 intermediate people's courts and 30 higher people's courts (one for each region at provincial level) in the PRC,[194] two major concerns are: (1) Would the current ALL jurisdiction rules be realistic for the future AML administrative litigation? (2) Would the PRC have resources to train sufficient judges of all these courts in order to apply the AML competently?

The answers might be negative. The present writer therefore proposed that future AML revision and/or other (non-)legislation efforts should further address jurisdiction problem of the AML administrative litigation.

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[193] According to *Zhongguo Falu Nianjian & Zhongguo Sifa Xingzheng Nianjian (Yearbook of Chinese Legal System & Yearbook of Chinese Judicial Administration)*, various years between 1989-2006, no first trial of administrative litigation has been found to start from a higher people's court.

[194] See discussion of court system of the PRC in ch2, above. Also see official information of the trail system at: <http://www.china.org.cn/english/Judiciary/31280.htm>.

Similar concerns have expressed by some commentators but they have not provided reasons for their argument. For example, Mr Wang Da, a judge of the Supreme People's Court has recently suggested that the AML can specifically stipulate that the court of first instance for AML administrative litigation is the Higher People's Court of Beijing, and the appellant court is the Supreme People's Court of PRC.[195] Whether Mr Wang's suggestion will be adopted is uncertain. The 2006 SCNPC Summary has showed no comments on courts' competence and jurisdiction problems.

8.4.1.5 Limitation Periods

According to Article 57 and 60 of the ALL, the limitation period for first instance courts to deliver judgments of administrative litigation is three month, and the period for appellant courts to deliver final judgments is two month. These periods can be extended unlimitedly upon approvals from the Supreme People's Court. According to competition enforcement experience of the EC and the USA, for example, 'the normal CFI procedure takes around thirty months',[196] the three-month and two-month limitation periods would be too unrealistic to deliver AML judgments although they can be extended, the unlimited extension implies however insufficient protection of legitimate expectations.

8.4.2 Civil Litigation: Is There Space for Private Enforcement?

According to the AML, undertakings shall be responsible for civil liabilities if their monopolistic conduct cause damages to others.[197] Clarification is needed such as procedures available for seeking AML compensation, the scope of the vague term 'others', the level of compensation, and whether AMEA decisions are prerequisites for seeking AML compensations, etc. The 2005 ABA Joint Comments presume that since no AML damage claim may be commenced until the AMEA has imposed a decision

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[195] Wang Da, 'Cong Ribende Fanlongduan Zhidu Tan Zhongguo de Fanlongduan Lifa' (Analysis on Chinese Anti-Monopoly Legislation in the light of Japanese Anti-Monopoly System) in Cheng (ed), *An Exploration of China's Legislation of Competition* 173-74, see n 4, above.

[196] L. O. Blanco & K. J. Jorgens, 'Antitrust Rules (Articles 81 & 82 EC)' in L. O. Blanco (ed), *European Community Competition Procedure* (2nd edn Oxford University Press, Oxford 2006) 60.

[197] AML, art 50

and confirmed a finding of monopolistic conduct, an injured party must complain to the AMEA first.[198] However, another commentator argues that private enforcement can be a powerful tool to facilitate AML compliance. Furthermore, designing punitive damage calculations could provide incentives to injured parties to take action, especially where they cannot persuade the AMEA to act. Such action could also be a deterrent to offenders.[199]

In practice, prior to the enactment of the AML, Chinese undertakings are actively seeking legal basis from the existing framework, for example, by relying on the 1993 AUCL and the 1999 Contract Law, to challenge competitors' alleged monopolistic conduct. High-profile cases include Sichuan Dexian v Shanghai Sony Guangdian Electronics on leverage effect and bundling of consumables in aftermarket and Dongjin v Intel on bundling and interoperability/IP rights disputes.[200] At the same time, Chinese judges have written decisions that are consistent with the AML legislation based on broad principles in older statutes.[201]

Therefore, whether there is any space for AML private enforcement, whether private enforcement should be encouraged to play a larger role in the AML enforcement, and if yes, whether Chinese courts could be competent to handle AML damage disputes which are not based on the AMEA's public enforcement are worth to be further addressed.

8.5 Anti-Monopoly Enforcement v Sectoral Regulations Implementation

The relationship between competition law and industry policy constitute a highly complex problem. Under the AML context, prior to the November 2005 Draft, the proposed law stipulate that it applies to market competition of regulated industry, even

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[198] *ABA* (n 3) *Joint Comments 2005*, 32-33.

[199] *Williams* (n 3) 189.

[200] See 6.4, above.

[201] Comments given by a UK trade and competition lawyer active in China.

where sector-specific laws and/or regulations exist.[202] Nevertheless, recently drafts (until the Second Reading Draft) all compromised to national industry policy and provided that if other regulatory structure exists, it takes priority.[203] However, many commentators criticized this approach and expressed their concerns on the possibility of regulatory failure of sector-specific approach, especially 'regulatory capture' which means 'the regulator is captured by the very industries being regulated.'[204]

The 1993 AUCL has similar arrangement that stipulated that 'where laws or administrative rules and regulations provide that other departments shall exercise the supervision and inspection, those provisions shall apply'.[205] Lessons from the AUCL were clear that numerous sectoral regulators and sectoral regulations have substantively challenged the hierarchy and effectiveness of the AUCL.[206]

The fact is, in part because of the backlash of the protectionism and the ever-growing sentiment of nationalism, industry policy supporters seemed much stronger than the enthusiastic AML advocates. For example, in the 2006 SCNPC Summary, the SASAC commented that whether natural monopolies and state-owned or controlled industries such as energy, telecommunication, petroleum, and railway, etc. should subject to the proposed AML need to be reconsidered. Some powerful regulators and SOE such as the STMB (State Tobacco Monopoly Bureau), SGCC (State Grid Corporation of China), CNPC (China Natural Gas & Petroleum Corporation), and several local governments claimed that industries of public utilities, tobaccos, banking and insurance, etc. should either subject to sectoral regulations or be granted anti-monopoly exceptions for the reasons of public interests and national security. On the contrary, the MOJ (Ministry of Justice), and many local governments expressed

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[202] See for example, the July 2005 Draft, art 43.

[203] See for example, the First Reading Draft, para 2 of art 2.

[204] See, for example, *Wang Xiaoye* (n 3) 6-7; *Williams* (n 3) 426; Paul Craig, *Administrative Law* (Sweet & Maxwell, London 2003) 360.

[205] AUCL 1993, art 3.

[206] See discussion in ch 3, above.

concerns on public grievance towards abusive behaviour of regulated industries and these sectors' tendency and ability to bypass the proposed law.

When examining the relationship between competition policy and regulation, Kirchner proposes that initial introduction of sectoral specific regulation may 'easily result in a regulatory deadlock' during the transformation process of state monopolies to competitive market. From the case of the PRC, this observation can be proved valid. Kirchner suggests that such regulatory deadlock 'can only be prevented or ended if prudent regulatory devices are combined with the early introduction of competition policy in downstream market'.[207] This suggestion however, may or may not be workable for the case at hand and which side could win in the competition between competition law and industry policy in the PRC still need to be seen.

8.6 Concluding Remarks: an Answer to the Possibility of the EC Competition Law Model as a Trojan Horse to China

Williams recently asks whether introducing an EC competition law model could be a Trojan horse for China since an anti-monopoly law may 'contain hidden dangers that might cause unforeseen consequences for the Chinese economy?' The writer does not define what these hidden dangers could be and what kind of consequences would they bring to China.[208]

Previously, Williams suggested that it may be possible that additional powers granted to the state authorities in order to promote competition could however be used to protect failing domestic industries from effective competition, a condition brought by new entrants to the domestic Chinese market.[209] Western governments and multinational companies have showed similar concerns as they fear that China may use the AML to check and block non-domestic competitors' access to the lucrative Chinese

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[207] Christian Kirchner, 'Competition policy vs. regulation: administration vs. judiciary' in Manfred Neumann & Jurgen Weigand (eds.), *The International Handbook of Competition* (Edward Elgar, Cheltenham 2004) 306-318.

[208] Mark Williams, (n 4) 'Adoption of the EC Competition Law Model', 324-357.

[209] *Williams* (n 4) 354.

market as well as to justify the government's heavy market intervention.

Williams' use of the 'Trojan horse' metaphor may imply the 'transformative power of legal transplants', a question which has been focused on by scholars of comparative law.[210] For example, Grossfeld observes that comparative law may function as an 'early warning system', which is alerting countries to impending social changes and how other systems are coping with those changes.[211] Scholars who have focused on the adoption of Western law in twentieth century Africa were also interested in the unintended cultural changes that accompany the reception of foreign law in a developing country. Hiller writes:

> ...while any developing country can probably adopt and adapt any law or body of laws from another culture, ..., such laws or body of laws carry with them so much imperceptible and incommensurable cultural "baggage" that the receiving country will inevitably experience far more internal cultural change than it either realized, intended or would have intended.[212]

Bearing these warnings in mind, this writer has two comments regarding Willams' Trojan horse metaphor. First, although the AML could be abused by protectionists and nationalists, but the AML will be a vexed instrument and Chinese officials already realize that they have much 'effective' policy tools, for example, flexible sector-specific industry policies, to protect and promote domestic industries instead of referring to the AML. A vivid example is Carlyle's attempt to acquire Xugong. The proposed transaction was notified to MOFCOM according to 2003 M&A Rules in October 2005, the proposed acquiring shares have been deduced from 85% to 45%, but

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[210] Spencer Weber Waller, 'Neo-Realism and the International Harmonization of Law: Lessons from Antitrust' (1994) 42 *Kansas Law Review* 557-604, 567. In this article, Waller provides critical analysis on the transferability of national law and suggests 'a new focus on the harmonization of values and norms in place of a wasteful search for a common global text of competition law' (Waller, 581).

[211] Bernhard Grossfeld, *The Strength and Weakness of Comparative Law* (Tony Weir trans, 1990), 112. Cited by *Waller* (n 64) 567.

[212] Jack A Hiller, 'Language, Law, Sports and Culture: The Transferability or Non-Transferability of Words, Lifestyles, and Attitudes Through Law' (1978)12 *Valparaiso University Law Review* 434. Cited by *Waller* (n 64) 586.

the deal is still waiting to be cleared. The influence of 2003 M&A Rules (now the 2006 M&A Rules) is much marginalized by the MOFCOM, the SASAC and the NDRC. Instead, claims such as 'national economic security' can be relied on whenever it is convenient.

Secondly, the deeper reason for prevailing protectionism and nationalism might be found beyond market and competition. For example, one commentator observed that the Chinese ruling elites have become 'increasingly reliant on the facile notion that state-sponsored patriotism and nationalism can hold China's disparate groups together'.[213]

Therefore, this writer's answer to the possible 'Trojan horse' question is that, in the short run, since the PRC up to now shows very pragmatic and instrumental approach toward competition law and policy, an AML on its own cannot destroy the regime like the wooden horse to Trojans. Nevertheless, in the long run, the 'Trojan horse' metaphor may well predict the socio-cultural changes that will result from the ongoing and forthcoming tensions between the AML and its indigenous context.

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[213] Willy Wo-lap Lam, 'Unmark the man with wooden face', at: <http://www.project-syndicate.org/commentary/lam1/English>.

9

The Way Ahead

> It is evidence of a history – the history of power and antitrust law... But we can already glimpse a future that is certainly unknown, but for this very reason open to the options and the dilemmas of yesterday and today.
>
> - Giuliano Amato, Antitrust and the Bounds of Power[1]

Chinese competition law and policy is still in its infancy. Since competition law and policy indicates economic, political and social development stages of a specific jurisdiction, its focus is different across time and place. The emphasis of competition regulation in a transitional China, as noted by commentators, should be to facilitate the establishment of a competitive market. Such a goal is significantly different from the aim of maintaining an existing competitive environment in established market economies.[2] Furthermore, the predicaments, challenges and implications of getting the PRC, a former monopolist operator of the whole economy, to develop a workable competition law and policy, cannot be underestimated.

When examining multinational enterprises and the law, Muchlinski observes 'the interaction of MNEs with the political communities in which they operate', and identified 'ideological themes' that have influenced the development of MNE regulation.[3] From the preceding discussions, one may also see the strong influence of European experience as well as Nationalism, the 'regulated market perspective' and the 'Marxist' perspective. As already discussed, the tension between a transitional

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[1] Giuliano Amato, *Antitrust and Bound of Power* (Hart Publishing, Oxford 1997) 129.

[2] Bing Song, 'Competition Policy in a Transition Economy: The Case of China' (1995) 31 *Stanford Journal of International Law* 387, 394.

[3] Muchlinski identified a number of ideological 'Building Blocks' including perspectives of the 'Neo-Classical Market', the 'Regulated Market' and the 'Marxist' and the influence of Nationalism. See, Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn Oxford University Press, Oxford 2007) 81, and 90-96.

economy and a still highly concentrated political regime is more obviously reflected by the AML than any other existing law of the PRC. For example, to prohibit the abuse of administrative power to restrict competition, a system of legal, economic and political instruments is required. Neither legal nor non-legal approaches alone are sufficient. Without being sustained by an independent judiciary and a competent quasi-judiciary competition authority, using administrative power to check administrative power may be unfeasible. Moreover, in order to establish a transparent and administrable competition regime, administrative guidelines and notices are required to clarify a series of uncertain points under the AML. For example, block exemption regulations may be urgently needed to enable the AML monopoly agreement exemption rules workable in practice.

As regards merger control rules, western governments and MNCs feared that China may use the AML to block non-domestic competitors' access to the lucrative Chinese market as well as to justify the government heavy market intervention under the name of 'national security'. Recent overseas investments by Chinese enterprises and sovereign wealth funds have caused many to believe that the AML may reflect the fact that an increasingly prosperous China no longer needs foreign investment as badly as before and that Beijing is therefore using its national security review to discourage foreign investment. Nonetheless, it is unclear how such a national security review will be applied and the wording of Article 31 AML actually indicates that Chinese policymakers intend to use other laws and regulations but not the AML to deal with concerns on national security.

Moreover, the AML enforcement mechanism and various concerns towards this mechanism are located at the crossroads of economic and political power in the PRC. It is still difficult to tell how the AMC and the AMEA will be organized by 1 August 2008, when the AML will come into force. Understandably, there are real fears that the insufficient checks on and excessive discretion under the AML could lead to unnecessary government interference into the marketplace or heavy business burdens

or both. One may predict that concerns on transparency, predictability, consistency, procedural equity, and compliance will continue to be focuses of Chinese competition law and policy discourse.

Having said all that, the substantial and positive impact of the AML and of broader competition policy to the PRC should not be underestimated. For example, complaints have led to a number of recent price fixing cases coming to light, and the public enthusiasm towards the AML is particularly high. As commented by Professor Xiaoye Wang, an adviser to the AML legislative panel, 'the enactment of an anti-monopoly law is a beginning but not a finishing touch to Chinese competition legislation.'[4] Future competition law developments in the decades to come may prove to be heavily influenced by the newly-enacted AML, along with other legal and regulatory reforms by the PRC.

Markets are messy, complicated, and inevitably imperfect.[5] On the other hand, governments often fail to act ideally. The first priority of the transition in the PRC, in theory, has been the optimum use of scarce resources and the extent to which it can best be achieved in markets within an appropriate framework of law and institutions or, where markets cannot work, in other approaches. Because in the real world the alternative to the market is the government, and both are imperfect, the choice between them unavoidably turns on judgement of the comparative consequences of market failure and government failure. Some hold that government failure is likely to be more serious than market failure -- in which case government ought to keep its hands off the economy even in cases of market failure. Gary Becker states the position as follows:

> I am inclined to believe that monopoly and other imperfections are at least as important, and perhaps substantially more so, in the political

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[4] Wang Xiaoye, 'Fanlongduanfa: Zhongguo jingji tizhi gaige de lichengbei' (The Anti-Monopoly Law: a landmark of China's economic reform) *Fazhi Ribao* (Legal Daily) (Beijing 1 September 2007).

[5] Bruce Doern and Stephen Wilks (eds), *Comparative Competition Policy* (Clarendon Press, Oxford 1996) 13.

sectors as in the market place... does the existence of market imperfections justify government intervention? The answer would be 'no' if the imperfections in government behaviour were greater than those in the market.[6]

Reminders of the existence of government failure are important since such failures are prevail in the contemporary PRC. Governments may well gear policies to special interests or other political considerations, rather than to the public welfare. Peter Muchliski, on the contrary, argues that the whole society should

> ... be vigilant against the hypocritical, self-serving, ideology of some senior executives who cry out against 'regulation' in the name of 'entrepreneurship' when they are in fact advocating a return to the 'state of nature' in which anything goes, nothing of much use, other than paper money, is produced, and people are cheated.[7]

A pragmatic recognition of the possibility of both market and government failure, besides suggesting efforts to improve markets and governance, would dictate careful and open-minded examination of competition law and policy issue to determine the best way to proceed. As observed by Gerber, '[c]ompetition law presents special epistemic problems, because it involves a variety of interrelated goals, values, and perspectives, and because economic causation issues that are central to its application are often complex and uncertain.'[8]

Furthermore, domestic and regional competition law is shaped by and shapes the law's ecological environment. Similar to other social phenomena, competition law is

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[6] Gary Becker, *The Economics Approach to Human Behavior* (The University of Chicago Press, Chicago 1976) 37.

[7] Peter Muchlinski, 'Enron and Beyond: Multinational Corporate Groups and the International Governance and Disclosure Regimes' (2004-2005) 37 *Connecticut Law Review* 725, 763.

[8] David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (1st Paperback edn Oxford University Press, Oxford 2001) xvii.

evolutionary and dynamic. Its influence can be both marginal and substantive across different jurisdictions and time.[9] In a broader context, when examining international harmonization of competition law, Waller observes that 'the failure to achieve uniformity is not just the result of bad faith, lack of clarity or misunderstanding of the common text. It is the product of a more fundamental disagreement about what it means to "value" something.' Waller observes the tensions between the USA and Japan regarding the Sharman Act as a suitable model for Japan to transplant new competition provisions at the end of the World War II. Waller used such tensions as an example of the problems and assumptions underlying attempts at harmonizing competition law. He noted that Japan lacks 'an indigenous tradition of competition as a value to enforce through legal mechanism' and much of the frustration of the USA 'stems from the assumption – at least implicit – that competition law in Japan should work in a similar fashion as in the United States'. Waller further comments that 'whether nations are actually discussing the same topic, or whether they are discussing very different topics but using overlapping vocabularies' should be determined. Waller thus suggests that 'a candid discussion of norms and values, rather than the enactment of specific legal rules'... would help avoid the fate of failures of the 'five great attempts' that have been made to achieve a true international harmonization of competition law in the twentieth century.[10] For example, during the negotiation process of the UNCTAD Set of Multilaterally Agreed Equitable Principles for the Control of Restrictive Business Practices (RBP Code)' of 1980, the USA and many other developed countries 'were talking about antitrust, or something close to it. The unaligned nations were using the rhetoric of antitrust to talk about development needs and the transfer of technology. It was unclear that, if anything, the socialist bloc thought it was discussing, other than a

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[9] For example, despite the textual similarities between the US Sherman Act and the Japanese Antimonopoly Act and the significant role of the USA in the promulgation of the Japanese Antimonopoly Act, the Act has been enforced much less frequently than the comparable US laws. Moreover, the Act has been often perceived more as an instrument of industrial development and a barrier to market access than a true antitrust system. See analysis in Spencer Weber Waller, 'Neo-Realism and the International Harmonization of Law: Lessons from Antitrust' (1994) 42 *Kansas Law Review* 592-93.

[10] The 'five great attempts' referred by Waller included efforts on harmonization of competition law made by the League of Nations, the proposed International Trade Organization (ITO), the Economic and Social Council of the United Nations, the Organisation for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development. See, *Waller* (n 11) 578-79, and fns 2-6.

set or principles that might disadvantage the West.'[11]

Regarding transplanting competition law in the PRC, after three decades opening-up and market economy reform, the conception and development of the AML is still sending multi-angle signals similar to what has been observed by Waller. The PRC is in the process of shaping its competition law and policy to meet indigenous societal needs. The mere task of drafting the AML took thirteen years. One may thus predict that the full establishment and optimal enforcement of Chinese competition law and policy may request much longer time to achieve. Such process requires sufficient political support. There are full bargains and pressures in the course of legislature, and the future of China's competition law, could be flooded with infinite struggles and conflicts. Therefore, whether such process may eliminate the core of a competition law system is calling for close observations and is open to further explanations.

Nevertheless, as manifested by this thesis, competition law and policy affects marketplace and governance of the PRC, although it is impossible to assess the extent of the effect at this very early stage. The cautious concluding remarks of this thesis is that the evolution of the Chinese competition law and policy is the outcome of a collision and fusion between indigenous conditions and Western experience, which occurs in connection with changes in the Chinese market, society and governance. Promulgating an AML was a small step – however fundamental – in the process of elaborating modern market economy, rule of law, and good governance in the PRC.

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[11] *Waller* (n11) 619.

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Appendix 2: Data Explanation for a Field Research during May and June 2005[716]

1. Introduction

During May and June 2005, the present author conducted a field research in mainland China to assess the country's ongoing anti-monopoly legislation for the purpose of supporting the author' PhD thesis. The main objective of this research was identical to the author's thesis, that is, to explore the interaction between a system of competition law and the law's ecological environment[717] in a transitional socialist China.[718]

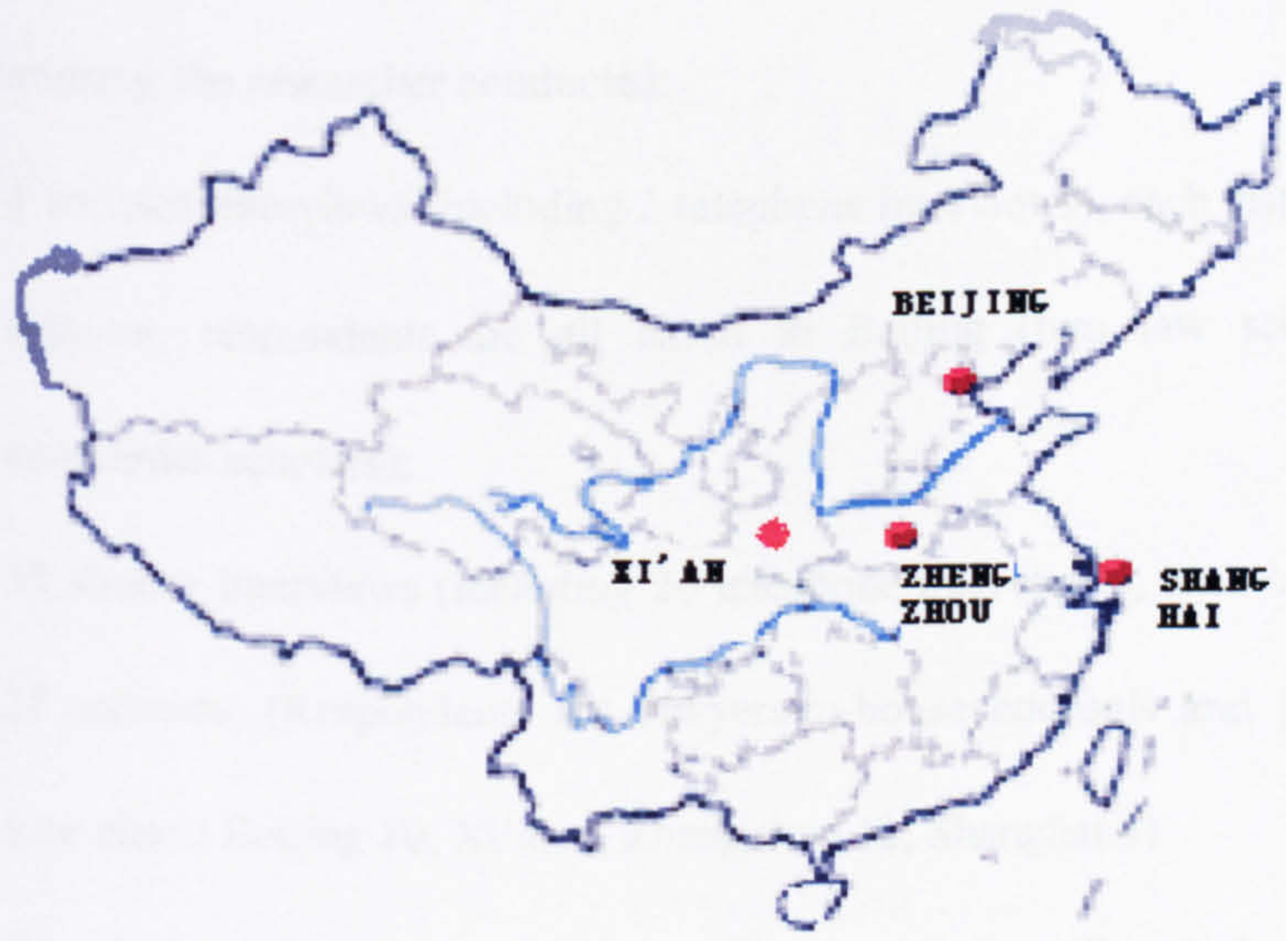

Figure 1

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[716] I am honoured and grateful for the generous funding from the University of London Central Research Fund (2004/2005, Ref. AR/CRF/C), without which the project would be unfeasible.

[717] The concept of 'ecology of competition law' is explored in chs 1 and 2 of the thesis.

[718] 'Transitional socialist China' refers to a regime in which the preconditions for a market economy and representative political institutions are not fully established. The regime is fundamentally different from 'established democracies', for instance, the UK and the USA. Although it is in transition, the regime is categorized by political scientists as a 'non-democracy' and therefore contrasts with 'democratizing regimes', for instance, post-communist Central and Eastern European Countries such as Hungary.

The body of the research comprised a series of extensive discussions, interviews with thought leaders of law and economics, government officials, business professionals, and the general public, with the research effort focus on four cities in Mainland China where the market competition features are both representative and nuances: Beijing, Shanghai, Xi'an, and Zhengzhou.[719] The research also comprised substantive review and analysis of relevant literature, data, and document. Below is the explanation of data that have been referred to in this author's thesis.

2. Interviews and Questionnaire Surveys:

In summary, the researcher conducted:

- 4 focused interviews (including 2 telephone interviews), each lasting about 40-65 minutes, respondents are all based in Beijing (two law scholars and two economics scholars);
- 32 shorter interviews (including 20 telephone interviews), each lasting about 10-25 minutes; (Respondents are lawyers/in-house counsels and judges based in four cities: Beijing 10, Xi'an 4, Zhengzhou 12, Shanghai 6)
- Questionnaire surveys: totally 279 respondents (See below for detailed classification)

Both the layout of the questionnaires and working language of the interviews were in Mandarin.

[719] See Figure 1 for geographic position of the four cities.

Classification and definition of participants

Respondents who participated in the research can be classified as legal professionals, law researchers/lectures and college students (mainly majored in law or economics), business/other professionals, government officials, and the general public. See Figure 2.1-2.5 for the distribution of questionnaires.

Figure 2.1 Distribution of respondents by cities

Total Respondents: 279

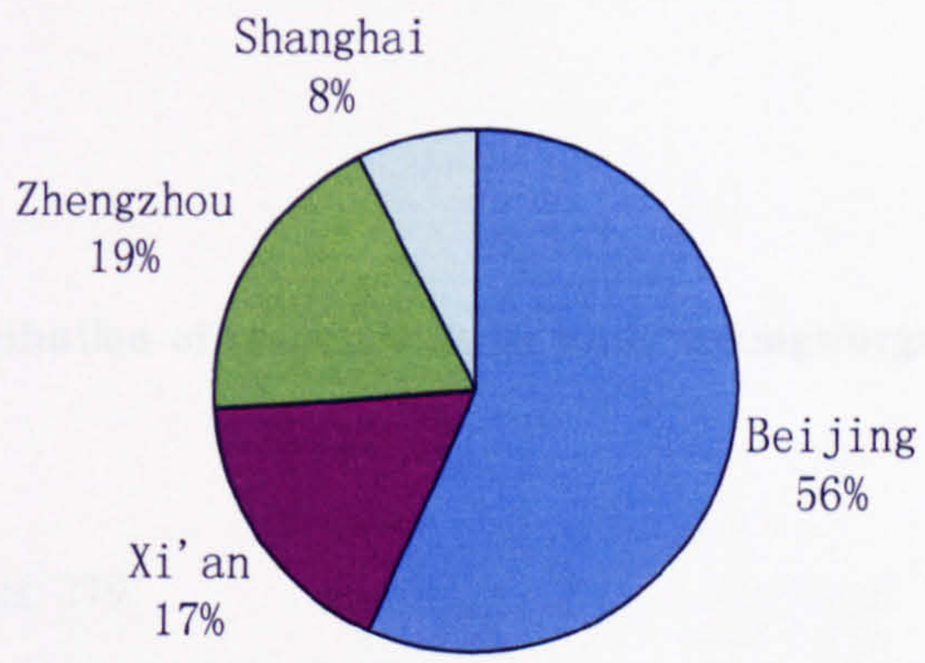


Figure 2.2 Distribution of respondents by Occupations

Total Respondents: 279

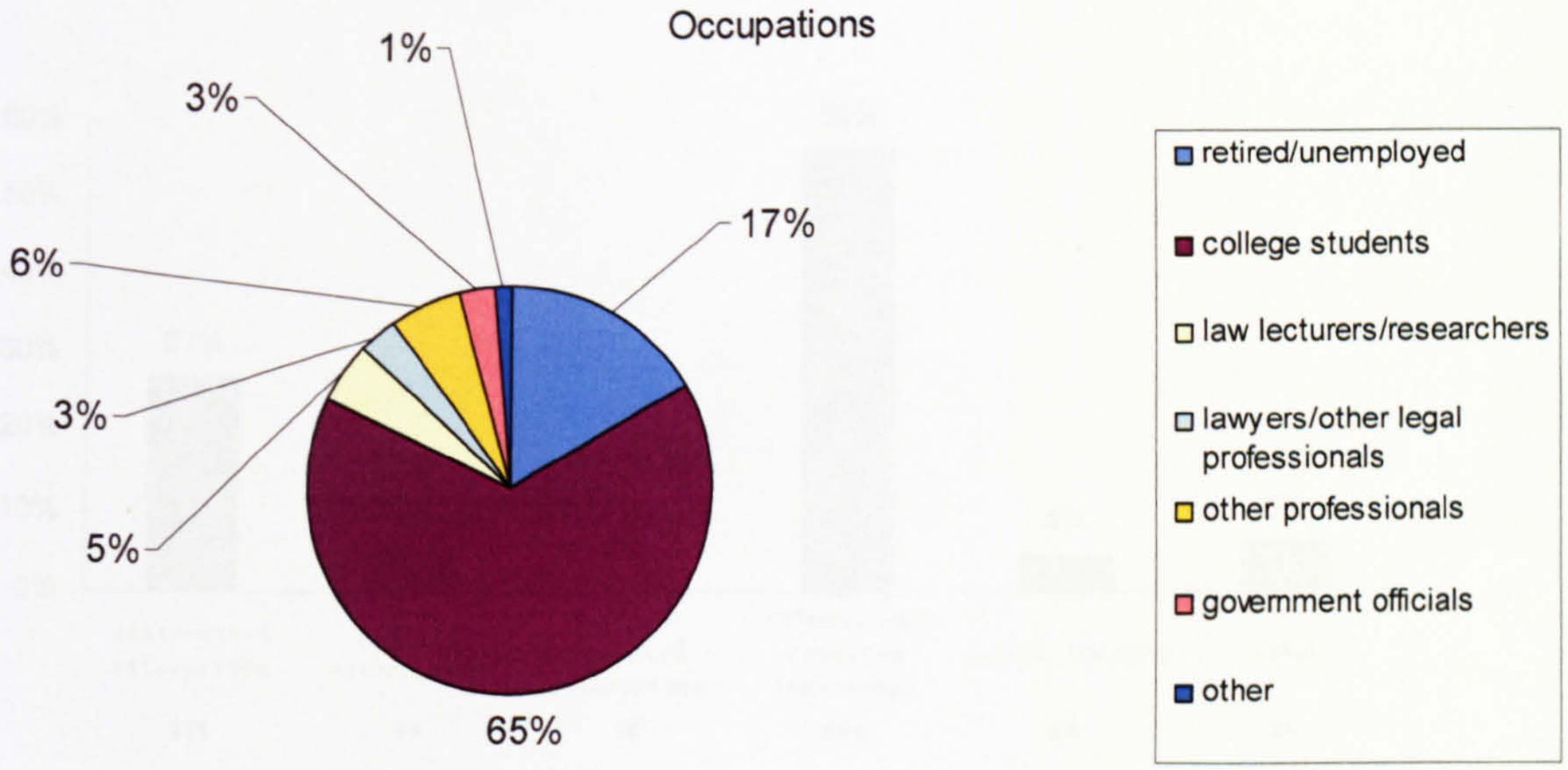


Figure 2.3 Distribution of respondents by undertakings/organisations ownership or type

Total Respondents: 279

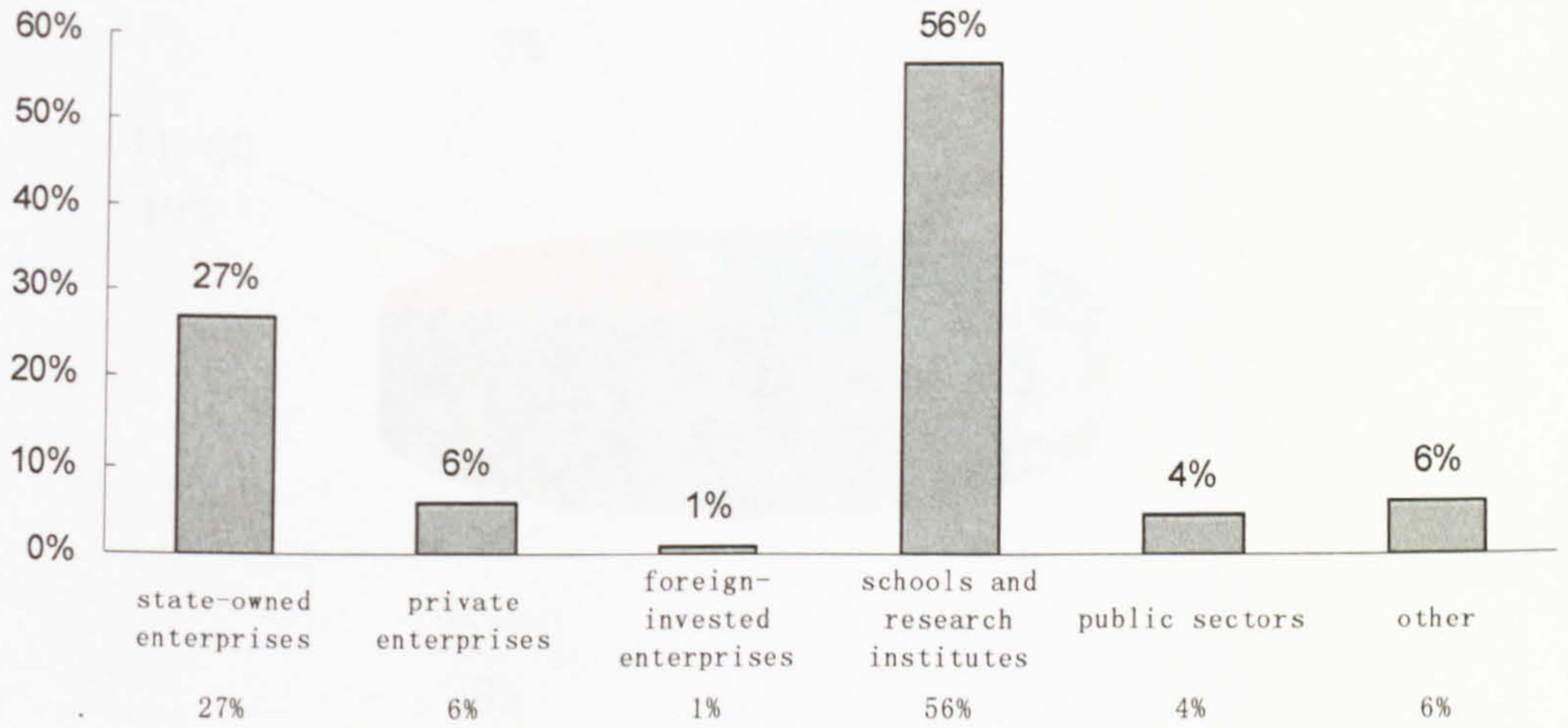


Figure 2.4 Distribution of respondents by educational background

Total Respondents: 279

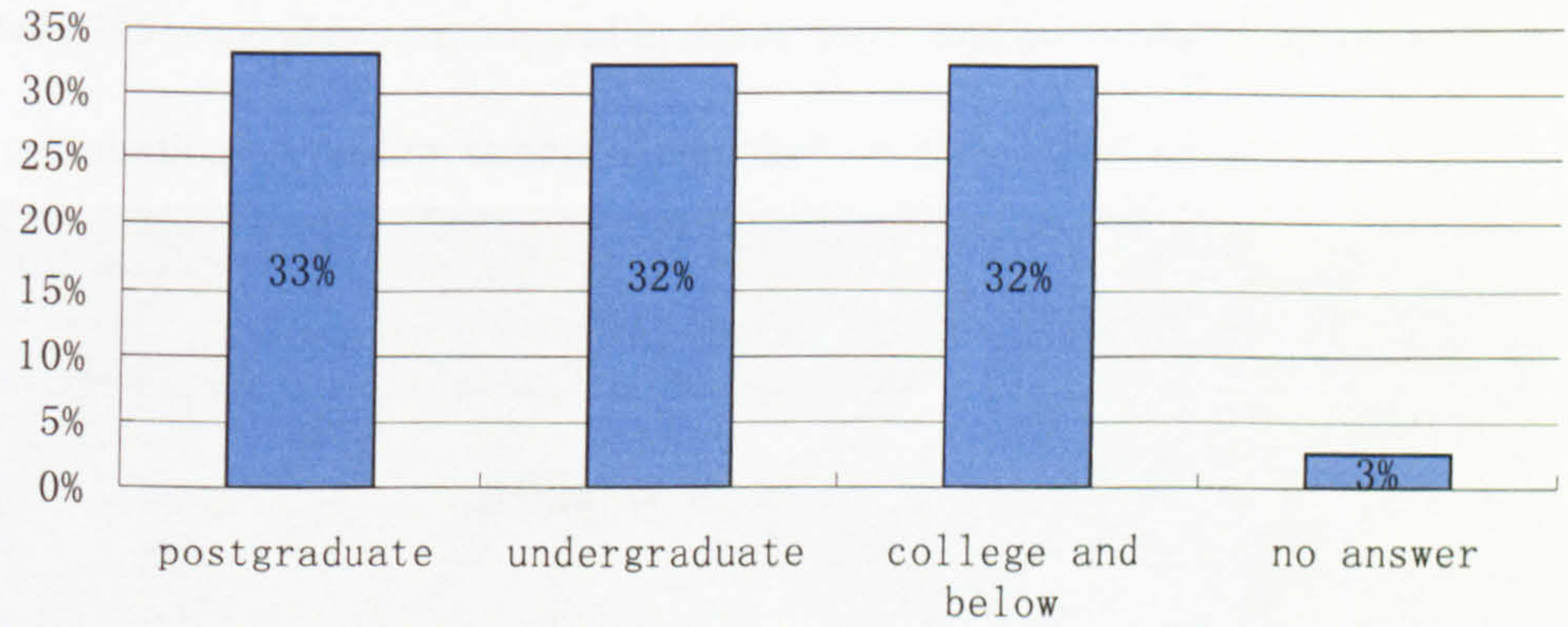
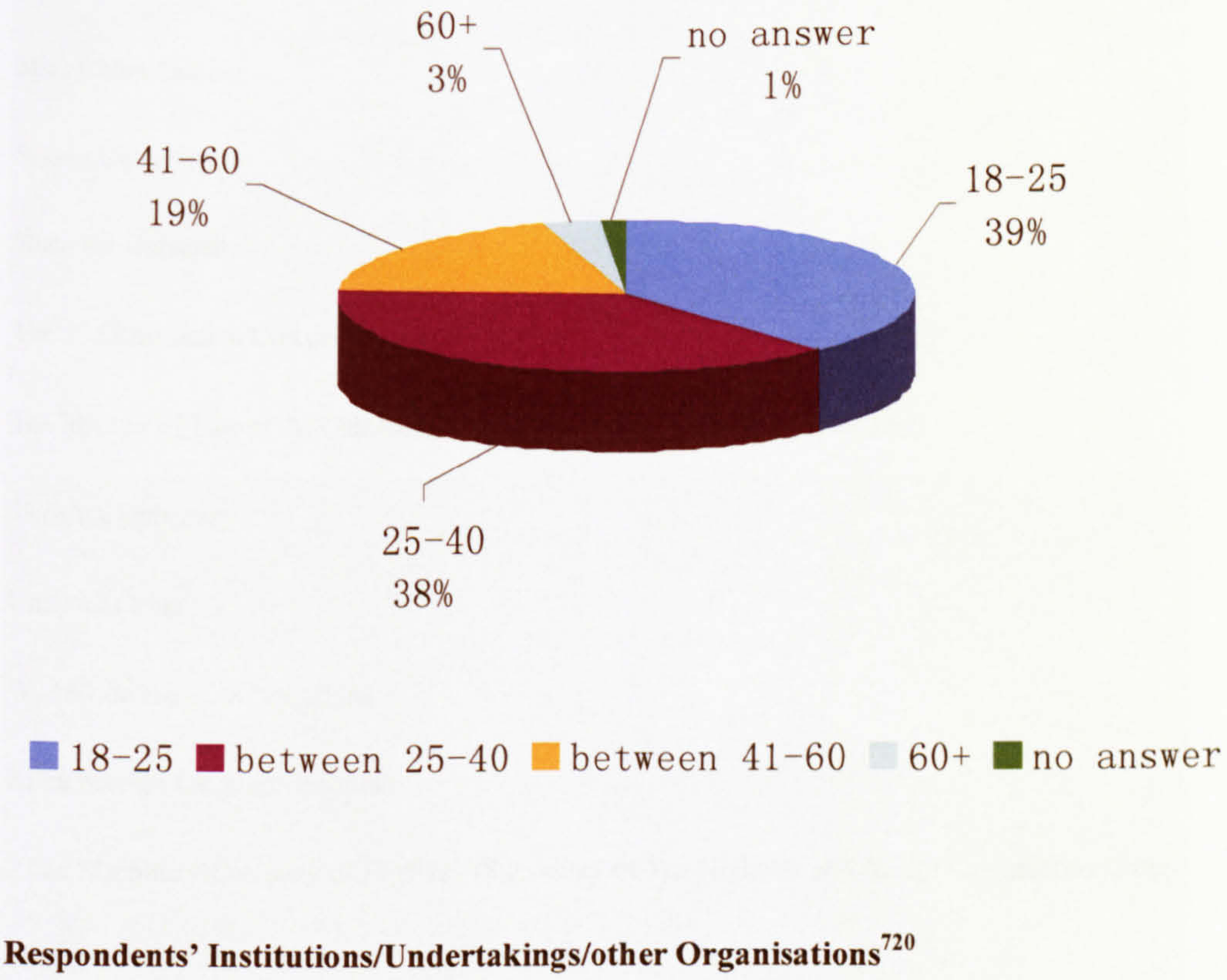


Figure 2.5 Distribution of respondents by ages

Total respondents: 279



Respondents' Institutions/Undertakings/other Organisations[720]

Totally 315 respondents participated in this research who are affiliated with more than 55 organisations. A random sample of organisations is provided below:

BASF China

Capital University of Economics and Business (CUEB, Beijing)

China University of Politics and Law (Beijing)

China Telecom

Huiyou Hostel, Beijing

Industrial and Commercial Bank of China, Zhengzhou Branch

[720] (1) The views expressed in this research reflect those of the respondents and do not necessarily reflect those of the institutions/organisations with which they are affiliated.

(2) The researcher cannot offer a list of governmental authorities, judicial courts, and law firms with which some respondents are affiliated, considering the political sensitiveness of this research. Respondents from these three categories were deemed strictly anonymous. It is worth noting that Chinese law firms are not totally autonomous as they are regulated by the Ministry of Justice, and are required to follow the CCP's ideological trend.

MacDonald's, China

Mars China, Beijing

Peking University

Shanghai University

The 5th Construction Company of Henan Province

The Institute of Law of the Chinese Academy of Social Science (CASS, Beijing)

Tsinghua University

Unilever China

Worldwide Travel, Xi'an, China

Xi'an Foreign Language University

Xi'an Machinery Company of Highway (Subsidiary of The Highway and Bridge Construction Group, China)

Xi'an Minsheng Department Store

Zhengzhou University

Appendix 3: Anti-Monopoly Law of the People's Republic of China[1]

(Adopted by the 29th Session of the Standing Committee of the 10th National People's Congress on August 30, 2007)

Table of Contents

[1] Unofficial translation for reference purposes only. Source: Nathan Bush, 'The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead' October 2007 *The Antitrust Source*, <www.antitrustsource.com>.

Chapter One General Provisions

Article 1 This law is enacted for the purposes of preventing and prohibiting Monopolistic Conduct, protecting fair market competition, promoting efficiency of economic operation, safeguarding the interests of consumers and the public interests, and promoting the healthy development of the socialist market economy.

Article 2 This law is applicable to Monopolistic Conduct in economic activities within the territory of the People's Republic of China. This law is applicable to Monopolistic Conduct outside the territory of the People's Republic of China that has eliminative or restrictive effects on competition in the domestic market of the People's Republic of China.

Article 3 "Monopolistic Conduct" referred to herein includes:

(1) conclusion of monopoly agreements by undertakings;

(2) abuse of dominant market positions by undertakings;

(3) concentrations of undertakings that have or are likely to have the effect of eliminating or restricting competition.

Article 4 The State shall formulate and implement competition rules suitable for the socialist market economy to improve control of the macro-economy and to strengthen a unified, open, competitive, and orderly market system.

Article 5 Undertakings may implement concentrations in accordance with the law through fair competition and voluntary combination to expand their business scale and to improve their market competitiveness.

Article 6 Undertakings with dominant market positions shall not abuse their dominant market positions to eliminate or restrict competition.

Article 7 With respect to industries that are controlled by the state-owned economy and that are critical to the wellbeing of the national economy and national security, as well as industries in which exclusive operation and exclusive sales are the norm of business in accordance with the law, the State shall protect the lawful business activities of the undertakings in such industries. The State shall regulate and supervise the business activities of such undertakings and regulate the prices of commodities and services provided by such undertakings in accordance with the law so as to protect the interests of the consumers and to promote technological progress.

Undertakings in the industries referred to in the preceding paragraph shall conduct their business in accordance with the law, shall be honest and reputable in their business dealings, and shall maintain strict self-discipline and accept public supervision. They shall not harm the interests of consumers by utilizing their controlling positions or their status as the exclusive provider of certain services or products.

Article 8 Administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs shall not abuse their administrative power to eliminate or restrict competition.

Article 9 The State Council shall establish the Anti-Monopoly Commission which shall be responsible for organizing, coordinating, and guiding the anti-monopoly work. The Anti-Monopoly Commission shall perform the following duties:

(1) to research and formulate competition policies;

(2) to organize investigations, assess the overall market competition conditions, and publish the assessment reports;

(3) to formulate and promulgate anti-monopoly guidelines;

(4) to coordinate the anti-monopoly administrative enforcement work;

(5) to undertake other duties as designated by the State Council.

The State Council shall stipulate the composition of and the working rules of the Anti-Monopoly Commission.

Article 10 The authority appointed by the State Council to perform the function of anti-monopoly law enforcement (the "Anti-Monopoly Law Enforcement Authority under the State Council") shall be responsible for the anti-monopoly law enforcement work in accordance with the provisions of this law.

The Anti-Monopoly Law Enforcement Authority under the State Council may, if there is a practical need to do so, delegate to the corresponding agencies of the People's Governments at the levels of province, autonomous region and municipality directly under the central government responsibilities of the anti-monopoly law enforcement work in accordance with the provisions of this law, if necessary.

Article 11 The trade associations shall strengthen the self-discipline of industries to lead undertakings within their respective industries to carry out lawful competition and to maintain the order of market competition.

Article 12 "Undertakings" referred to herein mean natural persons, legal persons and other organizations that are engaged in manufacturing or otherwise dealing with commodities, or providing services.

"Relevant Market" referred to herein means the scope of commodities and the scope of territory within which the undertakings compete with each other during a specific period of time with respect to specific commodities or services (collectively "commodities").

Chapter Two Monopoly Agreements

Article 13 The following Monopoly Agreements among undertakings with competing relationship shall be prohibited:

(1) fixing or changing the price of commodities;

(2) limiting the outputs or sales volume of commodities;

(3) allocating the sales markets or the raw material purchasing markets;

(4) restricting the purchase of new technology or new equipment or restricting the development of new products;

(5) jointly boycotting transactions; or

(6) other Monopoly Agreements determined by the Anti-Monopoly Law Enforcement Authority under the State Council.

"Monopoly Agreements" referred to herein mean agreements, decisions or other concerted conducts that eliminate or restrict competition.

Article 14 Undertakings are prohibited from entering into Monopoly Agreements with their counter-parties that:

(1) fix the resale price of commodities sold to third parties;

(2) limit the minimum resale price of commodities sold to third parties; or

(3) other Monopoly Agreements determined by the Anti-Monopoly Law Enforcement Authority under the State Council.

Article 15 The provisions of Articles 13 and 14 shall not apply to agreements among undertakings if the undertakings can prove that such agreements fall under any of the following:

(1) for the purpose of improving technology, researching and developing new products;

(2) for the purpose of improving the product quality, reducing costs, enhancing efficiency, unifying specifications and standards of products, or implementing division of labor based on specialization;

(3) for the purpose of improving operational efficiency of small and medium-sized undertakings and enhancing their competitiveness;

(4) for the purpose of achieving public interests, including, but not limited to, energy saving, environmental protection, and disaster relief;

(5) for the purpose of alleviating serious decreases in sales volume or distinctive production surpluses due to economic depression;

(6) for the purpose of safeguarding legitimate interests in foreign trade and foreign economic cooperation;

(7) other circumstances as stipulated by laws and by the State Council.

If any Monopoly Agreements fall into the circumstances set forth in sub-clauses (1) to (5) above so that the provisions of Articles 13 and 14 are not applicable , the relevant undertakings must also prove that the agreement so concluded will not materially restrict competition in the Relevant Market and that the agreement can allow consumers to share the benefits generated therefrom.

Article 16 The trade associations shall not organize undertakings within their industries to engage in Monopolistic Conduct prohibited under this Chapter.

Chapter Three Abuse of Dominant Market Position

Article 17 Undertakings with dominant market positions are prohibited from abusing their dominant market positions by engaging in the following activities:

(1) selling commodities at unfair high prices or buying commodities at unfair low prices;

(2) selling commodities at prices below cost without any justification;

(3) refusing to transact with counter-parties with respect to a transaction without any justification;

(4) restricting, without any justification, their counter-parties to transact with such undertakings exclusively or to transact with other parties designated by such undertakings exclusively;

(5) engaging in tie-in sales of commodities or imposing other unreasonable conditions with respect to transactions without any justification;

(6) applying differential treatments to counter-parties to transactions who have the same qualifications with respect to transaction price and other transaction terms, without any justification;

(7) other activities that are deemed by the Anti-Monopoly Law Enforcement Authority of the State Council as abusing dominant market positions.

"Dominant Market Positions" referred to herein mean the market positions held by undertakings who are able to control the price or quantity of commodities, or other transaction terms in the Relevant Market or to block or affect the entry of other undertakings into the Relevant Market.

Article 18 A finding that certain undertaking has a Dominant Market Position shall be based on the following factors:

(1) the market share of the undertaking in the Relevant Market, and the competition conditions in the Relevant Market;

(2) the ability of the undertaking to control the sales market or the raw material purchasing market;

(3) the financial resources and the technical capacities of the undertaking;

(4) the extent to which other undertakings depend on the subject undertaking with respect to relevant transactions;

(5) the level of difficulty for other undertakings to enter the Relevant Market;

(6) other factors relating to the determination whether the subject undertaking has a Dominant Market Position.

Article 19 Undertakings may be presumed to have a Dominant Market Position if they satisfy any of the following conditions:

(1) the market share of one undertaking in the Relevant Market accounts for 1/2;

(2) the joint market share of two undertakings in the Relevant Market accounts for 2/3; or

(iii) the joint market share of three undertakings in the Relevant Market accounts for 3/4.

In case of circumstances set forth in the sub-clauses (2) and (3) above, if any of such undertakings has a market share less than 1/10, it shall not be presumed to have a Dominant Market Position.

If an undertaking which is presumed to have a Dominant Market Position presents evidences showing otherwise, it shall not be deemed to have a Dominant Market Position.

Chapter Four Concentration of Undertakings

Article 20 Concentration of undertakings means the following circumstances:

(1) a merger of undertakings;

(2) an acquisition by an undertaking of the control of other undertakings through acquiring equity or assets;

(3) an undertaking, by contracts or other means, acquiring control of other undertakings or the capability to exercise decisive influence on other undertakings.

Article 21 If a concentration of undertakings meets the thresholds for notification as stipulated by the State Council, the relevant undertakings shall file a notification with the Anti-monopoly Law Enforcement Authority under the State Council in advance. Without filing such a notification, the undertakings shall be prohibited from implementing the concentration.

Article 22 Undertakings are permitted not to file any notification with the Anti-Monopoly Law Enforcement Authority under the State Council if their concentration meets any of the following conditions:

(1) one undertaking participating in the concentration owns more than 50% of the voting shares or assets of each of the other participating undertakings;

(2) more than 50% of the voting shares or assets of every undertaking participating in the concentration are owned by a single undertaking that does not participate in the concentration.

Article 23 When undertakings file a notification of concentration with the Anti-Monopoly Law Enforcement Authority under the State Council, they shall submit the following documents and materials:

(1) the notification;

(2) an statement explaining the impact of the concentration upon the competition conditions of the Relevant Market;

(3) the concentration agreement;

(4) the financial and accounting reports of the undertakings participating in the concentration in the preceding fiscal year, which are audited by accountant firms;

(5) other documents and materials required by the Anti-Monopoly Law Enforcement Authority under the State Council.

The notification shall indicate clearly the name, address and business scope of the undertakings participating in the concentration, the proposed date for implementing the concentration and other matters as stipulated by the Anti-Monopoly Law Enforcement Authority under the State Council.

Article 24 If the documents and materials submitted by undertakings are not complete, undertakings shall file supplementary documents and materials within the time limit specified by the Anti-Monopoly Law Enforcement Authority under the State Council. If the undertakings make no supplementary filing within the specified time limit, it shall be deemed that no notification is filed.

Article 25 The Anti-Monopoly Law Enforcement Authority under the State Council shall conduct a preliminary review of the reporting undertakings, decide on whether to initiate further review, and notify the undertakings in writing of its decision within 30 days from the date of receipt of the documents and materials submitted by the undertakings in accordance with Article 23 hereof. The undertakings shall not implement the concentration

before the Anti-Monopoly Law Enforcement Authority under the State Council makes its decision.

The undertakings may implement the concentration if the Anti-monopoly Law Enforcement Authority under the State Council decides not to initiate further review or makes no decision within the time limit.

Article 26 If the Anti-monopoly Law Enforcement Authority under the State Council decides to initiate further review, it shall complete the review within 90 days from the date of the decision, decide whether to prohibit the concentration of the undertakings and notify the undertakings in writing thereof; in case of a decision to prohibit the concentration of undertakings, it shall explain its reasons. Undertakings shall not implement the concentration during the review period.

Under any of the following circumstances, the Anti-monopoly Law Enforcement Authority under the State Council may extend the time limit for the review set forth in the above paragraph by giving a written notice to the undertakings, provided that the extension shall not exceed 60 days at the maximum:

(1) the undertakings agree to extend the time limit for the review;

(2) the documents or materials submitted by the undertakings are inaccurate and need further verification; or

(3) material changes have occurred with respect to relevant circumstances since the undertakings filed the notification.

If the Anti-monopoly Law Enforcement Authority under the State Council makes no decision within the time limit, the undertakings may implement the concentration.

Article 27 The following factors shall be taken into consideration in the review of the concentration by undertakings:

(1) the market shares of undertakings participating in the concentration in the Relevant Market and their ability to control of the market;

(2) the degree of concentration in the Relevant Market;

(3) the effect that the concentration of undertakings may have on market access and technological progress;

(4) the effect that the concentration of undertakings may have on consumers and other relevant undertakings;

(5) the effect that the concentration of undertakings may have on the development of the national economy;

(6) other factors affecting the market competition that the Anti-Monopoly Law Enforcement Authority under the State Council deems relevant shall be taken into consideration.

Article 28 The Anti-Monopoly Law Enforcement Authority under the State Council shall make a decision to prohibit a concentration of undertakings if such concentration has or may have the effect of eliminating or restricting competition. However, the Anti-Monopoly Law Enforcement Authority under the State Council may decide not to prohibit a concentration if the undertakings can prove that the positive effects of such concentration on the competition obviously overweigh its negative effects or that the concentration is in the public interest.

Article 29 If the Anti-Monopoly Law Enforcement Authority under the State Council does not prohibit the concentration of undertakings, it may decide to impose restrictive conditions to reduce the adverse effects the concentration may have on competition.

Article 30 The Anti-Monopoly Law Enforcement Authority under the State Council shall publicize in a timely manner its decisions to prohibit the concentration of undertakings or to impose restrictive conditions on the concentration of undertakings.

Article 31 If the merger with or acquisition of domestic enterprises by foreign investors or other forms of concentration involving foreign investors concerns national security, in addition to the review of concentration of undertakings in accordance with the provisions of this Law, it shall be examined for national security review in accordance with relevant regulations of the State.

Chapter Five Abuse of Administrative Power to Eliminate or Restrict Competition

Article 32 Administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs shall not abuse their administrative powers to require or require in a disguised form organizations or individuals to deal in, purchase or use the commodities supplied by the undertakings designated by them.

Article 33 Administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs shall not abuse their administrative powers and take any of the following actions to hinder the free flow of commodities among different regions:

(1) to charge discriminatory fees under separate fee categories or at different rates, or fix discriminatory prices for commodities originated from other regions;

(2) to impose on commodities originated from other regions technical requirements or inspection standards different from those applied to similar local commodities, or cause commodities originated from other regions to be subject to discriminatory technical measures such as duplicate inspection or certification, so as to restrict the entry of commodities originated from other regions into the local markets;

(3) to implement special administrative licensing measures applicable only to commodities originated from other regions, so as to restrict the entry of commodities originated from other regions into the local markets;

(4) to set up checkpoints or take other measures to block the entry of commodities originated from other regions or the flow of local commodities out of the region;

(5) other actions that may impede the free flow of commodities among different regions.

Article 34 Administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs shall not abuse their administrative powers to exclude or restrict the participation of undertakings from other regions in local bidding activities by means such as prescribing discriminatory qualification requirements or standards or by not publishing information according to law.

Article 35 Administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs shall not abuse their administrative powers to exclude or restrict investment in their region or establishment of branches or subsidiaries in their region by undertakings from other regions, by applying means such as treatment not equal to what local undertakings are entitled to.

Article 36 Administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs shall not abuse their administrative powers to compel undertakings to engage in any Monopolistic Conduct set forth hereunder.

Article 37 Administrative agencies shall not abuse their administrative powers to make regulations that contain provisions eliminating or restricting competition.

Chapter Six Investigation of Suspected Monopolistic Conduct

Article 38 The Anti-Monopoly Law Enforcement Authority shall investigate suspected Monopolistic Conducts in accordance with the law.

Any organization or individual shall have the right to report any suspected Monopolistic Conduct to the Anti-Monopoly Law Enforcement Authority. The Anti-Monopoly Law Enforcement Authority shall maintain the confidentiality for the reporting organization or individual.

The Anti-Monopoly Law Enforcement Authority shall conduct necessary investigation if the report is in writing and includes relevant facts and evidence.

Article 39 When conducting investigations of the suspected Monopolistic Conduct, the Anti-Monopoly Law Enforcement Authority may take the following measures:

(1) entering into business premises of the undertaking being investigated or other relevant places for inspection;

(2) questioning the undertakings being investigated, interested parties, and other relevant organizations or individuals, requesting them to clarify the relevant facts and circumstances;

(3) examining or copying relevant documents, agreements, accounting books, business correspondence, electronic data and other materials of the undertakings being investigated, interested parties, and other relevant organizations or individuals;

(4) sealing or seizing relevant evidence;

(5) making inquiries about the bank accounts of the undertakings.

Measures as stipulated in the foregoing paragraph may be implemented only after a written report has been submitted to the principal responsible persons of the Anti-Monopoly Law Enforcement Authority and the relevant approval has been obtained.

Article 40 Investigations of suspected Monopolistic Conduct by the Anti-Monopoly Law Enforcement Authority shall be carried out by at least two enforcement officers and such officers shall present law enforcement certificates.

The enforcement officers shall maintain written records of their inquiries and investigations. Such written records shall be signed by the persons questioned or investigated.

Article 41 The Anti-Monopoly Law Enforcement Authority and its staff shall keep confidential commercial secrets obtained during the course of law enforcement.

Article 42 The undertakings being investigated, interested parties, or other relevant organizations or individuals shall cooperate with the Anti-Monopoly Law Enforcement Authority with respect to the performance of its functions in accordance with the Law and shall not refuse or hinder the investigation by the Anti-Monopoly Law Enforcement Authority.

Article 43 The undertakings being investigated and interested parties shall have the right to state their opinions. The Anti-Monopoly Law Enforcement Authority shall verify the facts, justifications and evidence presented by the undertakings being investigated and interested parties.

Article 44 After investigating and verifying the suspected Monopolistic Conduct, if the Anti-Monopoly Law Enforcement Authority determines that such conduct constitutes Monopolistic Conduct, it shall make a decision in accordance with the law and may publicize the decision to the public.

Article 45 With respect to a suspected Monopolistic Conduct being investigated by the Anti-Monopoly Law Enforcement Authority, if the undertakings being investigated commit themselves to take specific measures within the time limit approved by the Anti-Monopoly Law Enforcement Authority to eliminate the effects of such Monopolistic Conduct, the Anti-Monopoly Law Enforcement Authority may decide to suspend the investigation. The decision to suspend the investigation shall expressly state the specific commitment made by the undertakings being investigated.

If the Anti-Monopoly Law Enforcement Authority decides to suspend the investigation, it shall monitor the undertakings' performance of their commitments. If the

undertakings have fulfilled their commitments, the Anti-Monopoly Law Enforcement Authority may decide to terminate the investigation.

The Anti-Monopoly Law Enforcement Authority shall resume the investigation if one of the following circumstances occurs:

(1) the undertakings fails to fulfil their commitments;

(2) material changes have occurred with respect to the facts based on which the decision to suspend the investigation was made;

(3) the decision to suspend the investigation was made based on incomplete or untrue information provided by the undertakings.

Chapter Seven Legal Liabilities

Article 46 If the undertakings conclude and implement Monopoly Agreements in violation of relevant provisions of this Law, the Anti-Monopoly Law Enforcement Authority shall order the undertakings to stop such illegal act, confiscate their illegal gains and impose fines of more than 1% and less than 10% of their sales in the preceding year; if the Monopoly Agreement has not been implemented, fines of less than RMB500,000 may be imposed.

If the undertakings, on their own initiative, report to the Anti-Monopoly Law Enforcement Authority information concerning the conclusion of Monopoly Agreements and provide important evidence, the Anti-Monopoly Law Enforcement Authority may reduce the penalty imposed or grant exemption from penalty after weighing the relevant circumstances.

If trade associations organize undertakings within their respective industries to conclude Monopoly Agreements in violation of this Law, the Anti-Monopoly Law Enforcement Authority may impose a fine of no more than RMB500,000; if the circumstances are serious, the authority in charge of registration and administration of social organizations may revoke the registration of the trade organizations in accordance with the law.

Article 47 If the undertakings abuse their Dominant Market Positions in violation of relevant provisions of this Law, the Anti-Monopoly Law Enforcement Authority shall order the undertakings to stop such illegal act, confiscate their illegal gains and impose a fine of more than 1% and no less than 10% of their sales in the preceding year.

Article 48 If the undertakings implement the concentration in violation of relevant provisions of this Law, the Anti-Monopoly Law Enforcement Authority under the State Council shall order the undertakings to stop implementing the concentration, dispose of equity or asset within a specified time limit, transfer their business within a specified time limit or take other necessary measures to revert to the condition of the undertakings before the concentration and may impose a fine of no more than RMB500,000.

Article 49 The Anti-Monopoly Law Enforcement Authority shall take into consideration the nature, extent and duration of the illegal act and other factors in

determining the specific amount of the fines set forth in the Articles 46, 47 and 48 of this Law.

Article 50 Undertakings that cause loss to others as a result of their Monopolistic Conduct shall be liable for civil liabilities in accordance with the laws.

Article 51 If administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs abuse their administrative power and engage in activities eliminating or restricting competition, their superior authority shall order them to make correction; the chief officer directly responsible and other persons who are directly responsible shall be subject to disciplinary sanctions in accordance with the law. The Anti-Monopoly Law Enforcement Authority may propose to the relevant superior authority as to how to address the issue in accordance with the laws.

If there are other provisions in laws and administrative regulations concerning the regulation of actions eliminating or restricting competition that are taken by administrative agencies and organizations empowered by laws and regulations to have the function of administrating public affairs that abuse their administrative powers, such other provisions shall prevail.

Article 52 If any individual or organization refuses to provide relevant materials or information, or provide false materials or information, or conceal, destroy or remove evidence, or take other action to refuse or hinder the investigation conducted by the Anti-Monopoly Law Enforcement Authority in accordance with the law, the Anti-Monopoly Law Enforcement Authority shall order such individual or organization to make correction. the Anti-Monopoly Law Enforcement Authority may impose a fine of less than RMB20,000 on individuals or a fine of no more than RMB200,000 on organizations; if the circumstances are serious, a fine of more than RMB20,000 and less than RMB100,000 may be imposed on individuals and a fine of more than RMB200,000 and less than RMB1,000,000 on organizations; if any conduct constitutes a criminal offence, the relevant individual or organization shall be prosecuted for criminal liability in accordance with the law.

Article 53 If any individual or organization objects to the decision made by the Anti-Monopoly Law Enforcement Authority in accordance with Articles 28 and 29 hereof, they may first apply for administrative review in accordance with the law; if they object to the decision of the administrative review, they may file an administrative lawsuit in accordance with the law.

If any individual or organization objects to decisions made by the Anti-Monopoly Law Enforcement Authority other than those specified in the preceding paragraph, they may apply for administrative review or file an administrative lawsuit in accordance with the law.

Article 54 Any staff of the Anti-Monopoly Law Enforcement Authority who abuse their powers, fail to fulfil their duties, conduct irregularities for personal gains, or disclose commercial secrets obtained in the course of law enforcement shall be prosecuted for criminal liabilities in accordance with the law if their conducts constitute criminal offences, or shall be subject to disciplinary sanctions in accordance with the law if their conducts do not constitute criminal offences.

Chapter Eight Supplementary Provisions

Article 55 This law shall not apply to Undertakings' conducts that are exercising their intellectual property rights in accordance with the provisions of laws and administrative regulations relating to intellectual property rights. However, this law shall apply to Undertakings' conducts that eliminate or restrict competition by abusing their intellectual property rights.

Article 56 This law shall not apply to the alliance among or concerted actions by farmers and the farmers' economic organizations in connection with the production, processing, sales, transportation, and storage of agricultural products and other business activities related to agricultural products.

Article 57 This law shall become effective as of August 1, 2008.